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Supreme Court of the United States

OCTOBER TERM, 1960

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; SILVIO GUTIERREZ; and NAPOLEON DUPOUY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review three judgments of the United States Court of Appeals for the Second Circuit entered on December 30, 1960. Those judgments reversed orders of the United States District Court for the Southern District of New York which had denied motions to quash subpoenas duces tecum. The subpoenas were issued by the clerk of the district court, upon the application of petitioner, and required officials of the three respondent banks and another bank to ap-

pear and testify upon oral deposition in New York and to bring with them specified bank records. The records were sought for use as evidence in an international extradition case then and now pending in the United States District Court for the Southern District of Florida, Miami Division, which has been heard by the Honorable William C. Mathes.[1] Petitioner is the representative of the government of Venezuela which is demanding extradition in that case.

THE JUDGMENTS AND OPINION BELOW

The order of the district court involved in this proceeding, dated May 16, 1960, and the opinion of Chief Judge Ryan of the district court dated May 13, 1960, are set forth in Appendix 2. Judge Ryan's opinion is reported at 183 F. Supp. 865.

In the Court of Appeals the three appeals[2] were consolidated for argument, but separate judgments were entered, dated December 30, 1960. The judgments are set forth in Appendix 1, and are unreported.

The opinion of the Court of Appeals is also set forth in Appendix 1. It was released on January 3 and has not yet been reported.

JURISDICTION

The judgments of the United States Court of Appeals for the Second Circuit were entered on December 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Sitting by special assignment.

[2] Petitioner here was the appellee in all three cases. The appellants were the banks in No. 26325, Silvio Gutierrez in No. 26326, and Napoleon Dupouy in No. 26327.

QUESTIONS PRESENTED

1. In an extradition proceeding pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. § 3184, has a district court or judge the power to issue compulsory process similar to that provided for in the Federal Rules of Civil Procedure, on the application of the demanding government, in order to secure material and relevant evidence?

2. In such an extradition proceeding, if a district court or judge has power to issue compulsory process similar to that provided in the Federal Rules of Civil Procedure, is the exercise of such power, where a sufficient showing of relevancy and materiality of the evidence sought has been made, limited to "exceptional situations where a strong showing of need is made"?

3. On review of a district court's denial of motions to quash subpoenas issued in such an extradition proceeding, does a United States Court of Appeals have power to evaluate the evidence submitted by the demanding government to the extradition judge?

4. In such an extradition proceeding is the issuance of a deposition subpoena to obtain relevant and material evidence of financial crimes precluded as a matter of law merely because evidence previously submitted, tending to show the commission of such a crime or crimes, involves a dollar amount exceeding $200, the minimum required by the Treaty as interpreted by the Court of Appeals?

STATEMENT

This petition and the proceedings from which it arose are very closely related to the petition before this Court in No. 77, *Manuel Aristeguieta* v. *The First*

National City Bank of New York, et al. Both cases stem from the same international extradition proceeding in the United States District Court for the Southern District of Florida. In both cases the Republic of Venezuela, the government demanding extradition, sought to subpoena bank records situated in New York in order to use the records as evidence in support of charges contained in the complaint. In both cases a district judge denied motions to quash the subpoenas. In No. 77 the United States Court of Appeals for the Fifth Circuit reversed the orders of the district judge, and petitioner sought review by a petition for certiorari filed last April. In that case the subpoena process was patterned on the analogy of Rule 17 of the Federal Rules of Criminal Precedure. In the present case, the subpoena process was fashioned after the analogy of the deposition subpoena procedure of Rules 26 and 45 of the Federal Rules of Civil Procedure.

In the present proceeding petitioner first filed motions before the extradition judge in Miami, for permission to take the depositions of four banks in New York (R. 51). Upon the granting of these motions deposition notices (R. 3) were served and presented to the clerk of the United States District Court for the Southern District of New York, who issued subpoenas to each deponent to appear and testify on oral deposition and to bring specified bank records (R. 16). The respondents moved to quash the subpoenas (R. 7, 64), their motions were denied by Chief Judge Ryan of that court (R. 93), and appeals were taken to the United States Court of Appeals for the Second Circuit (R. 95). That court reversed the order of Judge Ryan and petitioner now seeks review.

The extradition proceeding, to which both of these

petitions for certiorari are ancillary, was initiated by petitioner's complaint, filed on August 24, 1959, against Marcos Perez Jimenez, a citizen of Venezuela, charged in the original jurisdiction of the highest court of Venezuela with a variety of financial crimes and with four specified murders. The complaint (amended since the original filing) charges a series of crimes whereby the defendant enriched himself at the expense of the public, in violation of specified provisions of the Penal Code of Venezuela (Appendix 4). These crimes occurred during the period 1948-1958, when the defendant held high public office in Venezuela,[3] exercising the ultimate power over public finances and other governmental functions. The defendant was removed from power and fled the country in January of 1958, coming to Dade County, Florida, via the Dominican Republic.

Article II of the Extradition Treaty with Venezuela, 43 Stat. 1699, specifies the crimes for which extradition shall be granted under the Treaty and embraces the crimes specified in the second amended complaint in the extradition proceeding.

Concurrently with the extradition complaint in the district court, a request for extradition was presented to the Department of State by the Venezuelan Chargé d' Affaires in Washington, with a considerable volume of supporting documents containing some of the evidence against the defendant. These documents were subsequently filed in the district court in Miami. The documents include the charges preferred against

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[3] Member of the Government Junta of the Republic 1948-1952; Minister of Defense 1948-1953; Provisional President of the Republic 1952-1953; President of The Republic 1953-1958.

the defendant by the Attorney General of Venezuela, the finding of the Federal Court of Venezuela that the charges and evidence establish cause for his prosecution, the Federal Court's warrant for his arrest and its determination that his extradition should be sought, and a substantial quantity of the documentary evidence presented to the Federal Court. This evidence, filed in the district court in Miami on October 21, 1959, disclosed that defendant's program of illegal enrichment during his tenure of public office in Venezuela was carried out with the assistance of certain close associates and that he and they used the facilities of banks in the United States, among others. The evidence revealed specific transactions by which public funds were channeled to defendant's bank accounts, sometimes directly and sometimes through the bank accounts of one or more of those associates. The American banks especially involved are The First National Ctiy Bank of New York, French American Banking Corporation, the New York Branch of The Royal Bank of Canada, and Chemical Bank New York Trust Company (formerly the Chemical Corn Exchange Bank of New York).

First Attempt to Obtain Evidence From the Banks

Petitioner sought to obtain the banks' records to support its charges by serving, on November 9, 1959, notices for the depositions of officers of two of these banks—The First National City Bank and French American.[4] The notices were presented, in the manner contemplated by Rule 45(d)(1), F.R. Civ. P., to the clerk of the United States District Court for the

[4] Those notices appear in Appendix 5 and are contained in Exhibit C of petitioner's brief below, certified to this Court with the record by the clerk of the Court of Appeals.

Southern District of New York. The clerk issued subpoenas to those officers to appear for oral depositions within that district and to bring with them specified records of transactions of those banks with defendant and certain named associates.[5] Defendant then moved in the district court in Miami for a protective order pursuant to Rule 30(b), F. R. Civ. P. Judge Choate of that court on November 13, 1959, vacated the deposition notices, ruling that the procedure in the case should be governed by the Federal Rules of *Criminal* Procedure "as they may apply", rather than by the Civil Rules. This order was vacated by a second order of Judge Choate entered on November 23, 1959, providing that the Treaty was to govern the procedure and that the court "may, by order, provide for the securing of testimony where a witness cannot be secured to appear before the Court" (R. 27). On the same day Judge Mathes heard counsel for the parties on the appropriate method of compelling the production of the bank records.

Second Attempt to Obtain Evidence From the Banks

Thereupon counsel for petitioner submitted a motion, with supporting affidavit, for the issuance of orders in the nature of subpoenas duces tecum.[6] These orders were signed by Judge Mathes on November 25, 1959, served as provided for subpoenas under the Federal Rules of Criminal Procedure upon the officials of four

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[5] These subpoenas do not appear in the record, but were virtually identical to those set forth at R. 16-24.

[6] This motion appears in the original record of No. 77 before this Court, at pp. 5-8.

banks in New York and one in New Orleans, and return of service was duly made.[7]

Three of the banks—The First National City Bank, French American and The Royal Bank—moved jointly before Judge Mathes to quash those subpoenas. Several depositors in those banks and one depositor in the Chemical Bank moved also to quash the subpoenas. Records of the accounts of those depositors were among the records described in the subpoenas.

Judge Mathes, after extensive oral argument on December 14, 1959, and January 4, 1960, denied all motions to quash, though he modified the subpoenas to minimize the burden on the banks and to protect the interests of the depositors. The banks and depositors who had moved to quash appealed to the United States Court of Appeals for the Fifth Circuit and asked leave to petition for a writ of prohibition or mandamus, urging lack of power in the district court or the district judge to issue a subpoena in an extradition case on behalf of the demanding government, and urging lack of power to issue a subpoena for service outside the district beyond 100 miles from the place of hearing.

The Fifth Circuit (Judge Rives dissenting) decided those appeals in favor of the banks and depositors, issuing its judgment on January 29, 1960, reversing the district court's orders. *Aristeguieta* v. *Jimenez, et al.*, 274 F. 2d 206 (5th Cir. 1960). Judge Mathes quashed the subpoenas in compliance with the mandate.

Petitioner herein then petitioned this Court to grant a writ of certiorari to review the decision of the Fifth

[7] Four of these five orders appear in the petition for certiorari in No. 77, Appendix 2, pp. 3-21.

Circuit. The proceedings described thus far are contained in the record and described in the petition in that case, No. 77.

Third Attempt to Obtain Evidence From the Banks

On February 25, 1960, petitioner took steps to secure the bank records in a way consistent with Judge Choate's order of November 23, 1959, by filing a motion in the district court for permission to take the depositions of officers of the three respondent banks in New York (R. 51). The motion contained a thorough discussion of the proceedings leading up to the motion. A hearing *in extenso* was held by Judge Mathes on March 7, 1960. On March 9 Judge Mathes signed an order granting permission to petitioner "to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including, without limitation, procedure for subpoenas duces tecum" (R. 43). On April 7, permission was similarly extended to petitioner to take the deposition of an official of the Chemical Bank.

Notices of deposition were duly served (R. 3) and presented to the clerk of the United States District Court for the Southern District of New York, who issued subpoenas to each deponent (R. 16), commanding him to appear and give testimony on deposition and to bring with him documents specified in the attachment to the subpoena (substantially the same as the documents specified in the earlier subpoenas on which the Fifth Circuit passed).

Three of the four banks resisted the depositions by petitioning the Fifth Circuit for leave to file a petition for a writ of prohibition or mandamus to vacate Judge

Mathes' order of March 9, on the ground that that order was contrary to the mandate of the Court of Appeals in the earlier litigation of the subpoenas. On March 25, however, that court denied permission to file the petition, stating that Judge Mathes' order of March 9 was not before it for decision in the earlier case and not contrary to the mandate in that case (R. 45).

Three of the banks and two depositors then attacked the subpoenas issued by the district court in New York by filing motions to quash in that court. Those motions were argued before Judge Ryan on April 14. Briefs were submitted and further argument was heard on May 13. On May 16, Judge Ryan issued his order and opinion denying the motions to quash. Appeals were taken and requests made to the Second Circuit for argument before the end of the term. Argument was had on June 16, 1960, and the depositions were stayed pending determination of the appeal.

The Second Circuit's judgments, reversing Judge Ryan, were entered on December 30, 1960 (Appendix 1). Petitioner, by motion filed on January 6, 1961, requested this Court to defer consideration of No. 77 until this petition could be filed, so that petitions for review of the decisions of the Fifth and Second Circuits could be considered together.

STATUTES AND TREATY PROVISIONS INVOLVED

The governing treaty is the Extradition Treaty of January 19, 1922, between the United States and Venezuela, 43 Stat. 1698, which contains, in pertinent part, the following provisions:

"ARTICLE I.

"The Government of the United States of America and the Government of the United States of Venezuela agree to deliver up to justice, by means of requisition duly made as herein provided, any person who may be charged with or may have been convicted of any of the crimes committed within the jurisdiction of one of the Contracting Parties and specified in Article II of this Convention, while said person was actually within such jurisdiction when the crime was committed, and who shall seek an asylum or who shall be found within the territories of the other. Such surrender shall take place only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there.

"ARTICLE II.

"In accordance with the provisions of this Convention, the persons shall be delivered who shall have been charged with or convicted of any of the following crimes:

* * *

"14. Embezzlement or criminal malversation committed within the jurisdiction of one of the parties by public officers or depositaries, where the amount embezzled exceeds 200 dollars in the United States of America or B. 1.000 in the United States of Venezuela.

* * *

"18. Obtaining money, valuable securities or other property by false pretenses or receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so obtained or received exceeds 200 dollars in the United States of America or B. 1.000 in the United States of Venezuela.

* * *

"20. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director, or officer of any company or corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds 200 dollars in the United States of America or B. 1.000 in the United States of Venezuela.

* * *

"ARTICLE XI.

"The stipulations of this Convention shall be applicable to all territories wherever situated, belonging to either of the Contracting Parties or under the jurisdiction or control of either of them.

"Applications for the surrender of fugitives shall be made by the respective diplomatic agents of the Contracting Parties. In case of the absence of such agents from the country or its seat of government, or where extradition is sought from territory included in the preceding paragraph other than the United States, application may be made by superior consular officers.

"It shall be competent for such diplomatic or superior Consular officers to ask and obtain the preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested.

"If the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced. If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case.

* * *

"ARTICLE XIV.

"No person shall be tried for any crime or offense other than that for which he was surrendered."

* * *

Section 3184 of Title 18 of the United States Code provides as follows:

"§ 3184. Fugitives from foreign country to United States.

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

REASONS FOR GRANTING THE WRIT

The court below approached its decision in this case with a candidly expressed reluctance to permit procedures in an extradition case that are not explicitly authorized by the rules that have been promulgated by this Court. It stated that, "until such time as a procedural code of general application in international extradition is written, we are convinced that any power in the extradition magistrate to create his own rules or procedures should be limited to situations where the exercise of that power is essential in the particular case" (Appendix 1, p. 13). This narrow and technical view of the function of the extradition judge is not in keeping with a liberal interpretation of extradition treaties that this Court enjoined upon the courts in *Factor* v. *Laubenheimer*, 290 U.S. 276. The opinion was careful to state that it did not pass on the question whether "the procedural innovation sought to be used in this case is or is not within the rule-making power of the Supreme Court, or that the extradition magistrate may or may not be authorized to order the taking of depositions under any circumstances" (Appendix 1, p. 12).

Having thus questioned the power of a district judge to issue compulsory process at the instance of the demanding country, and having severely restricted that power with the novel requirement of a showing of essentiality, the court below disposed of the case upon two grounds. One ground was that the evidence that petitioner seeks "would appear to be merely cumulative" of evidence already in the record. The other ground was that the Treaty of Extradition with Venezuela requires only evidence of crime involving a total of more than $200, that Venezuela has submitted evidence involving a greater sum, and hence the evidence

that Venezuela now seeks can have no added legal effect.

1. The questions passed upon by the Court of Appeals have, in its own words, "far reaching consequence in the field of international extradition" (Appendix 1, p. 11). This is indeed the case. At the very least, the court below has severely circumscribed, if not precluded, the power of federal judges in international extradition cases to obtain evidence, admittedly material and relevant, by resort to compulsory process. In so circumscribing or precluding compulsory process, the Court of Appeals has decided important federal questions of the application of the Treaty of Extradition and extradition statute which badly need the consideration and definitive determination of this Court, affecting, as they may, the application of any of the sixty-six extradition treaties to which the United States is a party.

The effect of the decision below must be considered together with the decision of the Court of Appeals for the Fifth Circuit in the case that is before this Court on petition for a writ of certiorari as No. 77. The Fifth Circuit's decision has precluded subpoenas for the production of the bank records following, as a procedural analogy, the provisions of Rule 17 of the Criminal Rules. Now the Second Circuit's decision has precluded deposition subpoenas patterned on Rules 26 and 45 of the Civil Rules. Together the two decisions prevent a sovereign government, seeking extradition of an alleged criminal pursuant to Treaty, from obtaining documentary evidence, situated in the United States, that is relevant and material to the extradition case. Indeed, the court

below has conceded that the evidence is relevant and material.

In No. 77 the Court of Appeals for the Fifth Circuit held either that a federal judge sitting in an extradition case has no power to issue compulsory process at the request of the government demanding extradition, to obtain evidence relevant to that proceeding, or that this process may not be served beyond one hundred miles, as the Criminal Rules permit in criminal cases. Since no reasons for the decision were stated by the Fifth Circuit, petitioner does not know on which of these grounds, both of which were argued to the court, its judgment was founded. Now the Court of Appeals for the Second Circuit has greatly compounded the confusion. It is not prepared to rule that there is no power to issue compulsory process to secure the evidence that petitioner seeks. Some power, it believes, may exist. But if it does exist, the court concludes, it should not be used here for two reasons. One of these reasons involves a plain error in the construction of the Extradition Treaty, greatly limiting its usefulness. The other reason completely misconceives the role and authority of a Court of Appeals to weigh the evidence in an extradition case. As a final fillip to confusion, the court below puts forward the suggestion, contrary to a possible ground for the decision of the Fifth Circuit, that the Criminal Rules provide the better analogy in devising extradition procedure. If ever there was a tangle in a most important federal field, it has been produced here.

The confusion produced in the field of international extradition by the two decisions grows worse on closer analysis. If the Fifth Circuit decided the case before it on the ground that a subpoena must conform to the provisions of the Civil Rules and cannot be served

beyond 100 miles from the place of hearing, one would suppose that the Fifth Circuit would sustain a deposition and subpoena procedure that conformed to those rules. Yet when petitioner initiated that procedure, the Second Circuit stopped it. The Second Circuit's suggestion, on the other hand, that the Criminal Rules provide an acceptable procedural analogy in extradition cases would lead one to believe that a subpoena issued by the extradition judge pursuant to Rule 17 of those rules would be an appropriate form of process. Yet that is the procedure that petitioner had followed earlier, which the Fifth Circuit precluded. And if the Fifth Circuit decided that no power existed in the extradition judge to grant *any* subpoena, the Second Circuit has thrown this, too, into confusion by refusing to decide whether such power exists. It is more than district judges can do to penetrate this confusion and formulate acceptable procedures for compelling the production of evidence in international extradition cases. There is no confusion, however, about the result of the two decisions. The result is to block every effort that the Government of Venezuela has made to obtain material and relevant evidence that is situated in New York City within the jurisdiction of one or the other or both of the two district judges who have ordered that the evidence be produced.

Petitioner asks the Court initially to consider the basic question that is common to the two cases. Simply stated, it is whether petitioner, can, upon a showing of relevancy, materiality and good cause, obtain the production, through compulsory process, of documentary evidence that is physically situated in New York City for use in the extradition proceeding in Miami. The United States government, which has

the responsibility for entering into extradition treaties and for performing the United States' obligations and enforcing its rights thereunder, deemed the question important enough to appear in support of petitioner's position in the Second and Fifth Circuits and in this Court. The question can only be settled by this Court, and must be settled, if the appropriate extradition procedure is to be clarified.

2. The Court of Appeals has strained to avoid the question of the district judge's power of compulsory process by looking to whether the necessity has been shown for the exercise of such power. In doing so the Court of Appeals has abandoned the familiar standard of good cause, long followed by the federal courts as the measure of the showing required to support an application for a subpoena or an order to produce documents. The court did not merely hold that good cause was not shown—it has defined an entirely new standard. The court's own words are striking:

> ". . . whatever deposition privilege may be granted to the demanding country should be exercisable only in exceptional situations where a strong showing of need is made" (Appendix 1, p. 15).

At another point in the opinion the Court of Appeals speaks of limiting the subpoena procedures "to situations where the exercise of that power is *essential* in the particular case" (emphasis supplied) (Appendix 1, p. 13).

In contrast to the novel standard introduced by the Court of Appeals, an application for a subpoena under Rule 45, F.R.Civ.P., or a motion for an order to produce documents, has always called for a showing of good

cause.[8] This standard has become an accepted feature of federal court practice over a considerable period of years. What constitutes good cause is discretionary with the judge to whom the application is made, but a showing that the subpoenaed evidence is relevant and material and will aid the moving party's case is normally sufficient. 4 *Moore's Federal Practice*, § 34.08 (2d ed.). As stated in *Connecticut Mutual Life Insurance Co.* v. *Shields*, 17 F.R.D. 273 (S.D.N.Y. 1955),

> "The modern trend of the courts has been to construe the rules liberally. . . . In line with this trend towards the elimination for [sic] formalism, the greater number of courts considering the question of good cause have decided that good cause is established when it appears that the papers sought are relevant to the subject matter of the action. . . ." *Id.* at 277.

The Court of Appeals cited *Connecticut Mutual*, but ignored its teaching and that of the many authorities cited therein.

The Court of Appeals did not question the determination of both the extradition judge and Judge Ryan that the evidence sought by the depositions was material and relevant. Rather it established for international extradition cases an entirely new requirement of law to be met for the issuance of compulsory process—"exceptional situations where a strong show-

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[8] Although Rule 34 permits the court to order production of documents only upon a showing of "good cause", and Rule 45, on the other hand, authorizes the clerk to issue subpoenas for the production of documents merely upon application with no showing of "good cause" required, the courts generally treat Rule 45 *in pari materia* with Rule 34 so that "good cause" must be shown upon invocation of either Rule. 4 Moore's Federal Practice, § 26.10 (2d ed.), Connecticut Mutual Life Insurance Co. v. Shields, 17 F.R.D. 273, 275 (S.D.N.Y. 1955).

ing of need is made." This new rule is in conflict with the rule followed by other circuits, that the discretion of the district judge should be accorded controlling weight. See *Tiedman* v. *American Pigment Corp.*, 253 F. 2d 803, 808 (4th Cir. 1958), where Judge Sobeloff ruled:

> "An appellate court does not, however, decide whether it would, in the first instance, have permitted the discovery prayed for.
>
> Granting or denying a request under rule 34 is a matter within the trial court's discretion, and it will be reversed only if the action taken was improvident and affected substantial rights."[9]

See also *Carter* v. *Baltimore & O. R. Co.*, 152 F.2d 129 (D.C. Cir. 1945).

Boeing Airplane Co. v. *Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960), cited by the court below as supporting the proposition that "some showing of need is necessary," does not support the court's imposition of the more stringent requirement, but supports the Fourth Circuit's conflicting view. Although Judge Washington's opinion in *Boeing* says that good cause "may ordinarily be sustained by a claim that the requested documents are necessary to establishment of the moving party's claim," the result in that case was not determined by that language, but by Judge Washington's holding that "if the Tax Court, in the exercise of its

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[9] It is significant, and a stronger case for allowing the process that was ordered by judges Mathes and Ryan, that the subpoenas sought below were not intended merely to investigate evidence, but rather to produce evidence that was deemed material. The Court will recall that the earlier subpoenas for the bank records on which the Fifth Circuit passed ordered the production of the records in court. Contrast the explicit purpose of discovery which was before this Court in Miner v. Atlass, 363 U.S. 641.

discretion, decided to issue a subpoena to assist it in achieving a fair determination of excess profits, the District Court must give that fact substantial weight." It should be noted that the Tax Court issued the subpoenas seeking documents from the files of the United States Renegotiation Board. The Court of Appeals for the District of Columbia characterized this as "an unusual procedure", but it did not—as did the Court of Appeals below—require a more rigorous showing of good cause, much less substitute its judgment on that issue for that of the trier of fact. In short, the *Boeing* decision conflicts with, rather than supports, the action of the Court of Appeals below.

3. In determining that petitioner's showing did not satisfy its novel "necessity" standard, the Court of Appeals has invaded the most essential function of the extradition judge, and arrogated to itself, without warrant in the Treaty or extradition statute, the power to substitute its judgment for that of the district judge as to the sufficiency of the evidence already submitted and of that which petitioner seeks. The Court of Appeals held:

> "If, as Venezuela has indicated, it is willing to rest its case upon the record already made, the additional evidence sought would appear to be merely cumulative"[10] (Appendix 1, p. 17),

[10] In resting its case petitioner made it clear that it wished to reserve an opportunity to reopen, when and if the bank records became available. See petitioner's brief below, certified to this Court, p. 15. Subsequently, the extradition judge denied a motion to dismiss based, *inter alia*, upon the insufficiency of petitioner's evidence to support any of the charges in the complaint. He said, "[T]here are many questions here. . . . At this stage of the case I feel I should resolve them in favor of the plaintiff upon this motion." Denial was without prejudice to renewal of the motion after the submission of all the evidence. (Transcript, Aristeguieta v. Perez Jimenez, S.D. Fla. No. 9425-M-Civil, Sept. 9, 1960, p. 295).

and hence would not justify a subpoena. It so held despite the contrary conclusion of district judges Ryan and Mathes. The Court of Appeals thus decided that the evidence petitioner seeks could not add greater weight, in support of extradition, to the evidence then in the record. Both district judges had examined that question. The colloquy between Judge Ryan and the only respondent (Dupouy) who focused sharply on that issue follows:

> "Mr. Pickett: . . . The party desiring the subpoena normally would have to show good cause, which doesn't mean absolute necessity but probable utility and the need for it. Isn't that what should be done by the demanding country?
>
> "The Court: I think there is a sufficient showing of that here .
>
> * * *
>
> "Mr. Pickett: I am talking about more than subjective good faith. I am talking about objective probable or good cause.
>
> "The Court: There is sufficient here in the record to satisfy that, and I have so determined." (R. 79).

Judge Ryan also dealt with the question in his opinion:

> "The materiality and relevancy of the evidence sought and its probable existence in the hands of the banks in question was demonstrated by the extradition documents, respondent's affidavit and the oral hearing before the District Court to the satisfaction of that Court. . . . " (Appendix 2, pp. 8-9).

Judge Mathes' order permitting petitioner to initiate deposition-subpoena proceedings also stated the justi-

fication for the additional evidence, which had been argued before him *in extenso:*

> " . . . in the particular circumstances of this case and in the light of the charges being made herein by the plaintiff, the proceedings held in this case and the showing heretofore made by the plaintiff, the taking of such depositions in such manner of officials of the banks specified herein should be permitted in this case . . . ." (R. 44).

The two district judges have ruled that the evidence sought by the subpoenas is material and relevant to the issues in the proceeding. The Court of Appeals does not challenge those rulings. In addition, the two district judges held, in effect, that there appeared to be sufficient probability that the bank records would add to the weight of previously submitted evidence. Now the Court of Appeals, without seeing either the evidence in the record or the bank records that petitioner seeks, and having no inkling of what evidence the defendant proposes to submit, overturns the considered views of two district judges, one of whom had the extradition record before him. It held that the bank records could not add to the sufficiency or weight of the record already made, as a basis for extradition. But this evaluation is a function reserved *exclusively* to the extradition judge. It is settled that such a review is not permitted to an appellate court after the final determination of the extradition judge. *Collins* v. *Miller,* 252 U.S. 364, 368. And an evaluation of the sufficiency of the evidence is so clearly the heart of the function of an extradition judge that an appellate court should not be permitted to review his evaluation at any time during the proceedings. What the Court of Appeals did here was prematurely to attempt a re-

view of the extradition judge's evaluation of evidence that is not permitted to it at the conclusion of the case. This Court should prevent the Court of Appeals from thus invading the province of the extradition judge and eroding the rule against its review of his action.

4. A major reason assigned by the Court of Appeals for reversal and for its belief that the petitioner had not shown a "need" for the subpoenaed bank records involves a fundamental question of treaty interpretation that affects every one of the sixty-six extradition treaties to which the United States is a party.[11]

The court seized upon a statement of petitioner's counsel, contained in petitioner's opposition to defendant's motion for a protective order, that existing evidence would trace to its illegal sources $500,000 of deposits in defendant's United States bank accounts (R. 73). It concluded that the Treaty, to bring the charges within its terms, required only that the evidence show that a sum in excess of $200 was involved, and that, therefore, further evidence contained in the bank records could not "exceed in legal effectiveness" the evidence already submitted. This ruling expresses a fundamental misunderstanding of the Treaty of Extradition, for the Treaty requires evidence supporting *all* of the charges, not merely some charges involving more than $200.

Article II (14) of the Treaty specifies embezzlement and criminal malversation, for example, as extraditable crimes if more than $200 is involved.[12] If *one*

[11] These treaties are cited in the note to 18 U.S.C. § 3181 (1958 ed.).

[12] It should be noted that the extradition of the defendant is also sought under Art. II (18) and (20) for the same complex of

crime of embezzlement were charged, that dollar sum would bring the charge within the ambit of the Treaty. But the Court of Appeals postulates a situation that was not before it. There are *many* charges of embezzlement in the complaint, each in concrete detail and distinctly set forth, as an inspection of paragraph 15 of the extradition complaint will demonstrate (Appendix 4, pp. 5-28). Petitioner is entitled fully to develop each such charge, regardless of the dollar total. That total is a minimum, not a limitation.

Indeed, petitioner may act at its peril if it does not so develop each charge. Article XIV of the Treaty provides:

> "No person shall be tried for any crime or offense other than that for which he was surrendered." 43 Stat. 1706.

This means that petitioner cannot safely offer evidence only of some charges involving more than $200 because, if defendant is surrendered only on some charges, there is a danger that he cannot be tried in Venezuela on the other charges, as this Court has suggested in *Collins* v. *Loisel*, 262 U.S. 426, 431, and *Bryant* v. *United States*, 167 U.S. 104, 108. In the *Bryant* case the Court specifically stated that the trial would be " . . . upon the facts which appeared in evi-

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financial crimes charged under Art. II (14). (Appendix 4, p. 28). See Bryant v. United States, 167 U.S. 104. These paragraphs name as extraditable crimes, *inter alia*, receiving money or other property knowing it to have been unlawfully obtained (para. 18); and fraud or breach of trust by an agent or any fiduciary (para. 20). Both paragraphs contain the same monetary minimum as paragraph 14. Embezzlement may therefore be discussed illustratively.

dence before the commissioner and upon the charges or one of the charges for which he is surrendered, . . ." If evidence of additional charges were precluded in the extradition case, defendant might then be immunized by the extradition from any criminal proceeding in Venezuela on the other charges.

Petitioner must, therefore, offer in the extradition case evidence supporting probable cause as to *all* charges. It cannot stop at showing evidence merely of some offenses involving more than $200. In construing the Treaty to put a dollar limit on the demanding country's evidence, regardless of the range and variety of the criminal charges against the defendant, the Court of Appeals has badly distorted the Treaty in a way that will produce considerable confusion and misdirection in the field of extradition. This Court should correct the application of the Treaty to prevent the misinterpretation from being followed by district judges and other extradition magistrates.

Petitioner has, of course, offered evidence that relates to each charge, and, quite apart from its statement in the pleading quoted by the court below, petitioner believes that probable cause has been established by that evidence as to each charge. But what petitioner believes is not the point. The extradition judge has not yet made his final decision on the sufficiency of the evidence to warrant extradition. He *has* determined that the bank records are probably useful evidence to him in making that decision. The Court of Appeals does not make—and cannot review the sufficiency of the evidence to support—the final decision in the case, and that court must not be permitted to

second-guess the extradition judge's determination that the bank records would be useful to him. This is just what the Court of Appeals has done. Indeed, the pleading in which petitioner stated that existing evidence would trace $500,000 of the defendant's deposits was before the extradition judge. On consideration of that pleading the judge refused to issue a protective order to vacate the depositions. On the strength of the same pleading the Court of Appeals has ruled that the depositions and subpoenas for the bank records were not justified. Its ruling, based as it is on an erroneous interpretation of an extradition treaty that it correctly characterized as typical of United States extradition treaties, should be reviewed by this Court.

CONCLUSION

The court below has raised and passed upon important and novel federal questions that will have far-reaching effects on the conduct of international extradition cases in the courts of the United States. The court has imposed serious restrictions on the administration of the basic international extradition statute which in this case will, and in future international extradition cases may, gravely hamper the United States in performing its solemn obligations under the numerous treaties to which it is a party. In so doing, the Court of Appeals has disregarded this Court's repeated admonition, culminating in *Factor* v. *Laubenheimer, supra,* that the liberal purpose of extradition treaties should override a strict interpretation of statutory procedural provisions. Only this Court can provide the guidance—both to the lower courts and to the sovereign governments whose treaty interests are at stake—which the course of this extradition pro-

ceeding shows to be essential to the performance of treaty obligations of the United States. We urge the Court, therefore, to grant the writ of certiorari.

Respectfully submitted,

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January 31, 1961

APPENDICES

APPENDIX 1

Judgments and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 374, 375, 376—October Term, 1959.
(Argued June 16, 1960 Decided December 30, 1960.)
Docket Nos. 26325, 26326, 26327

Docket No. 26325

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK,
FRENCH AMERICAN BANKING CORPORATION and
THE ROYAL BANK OF CANADA,
Petitioners-Appellants,

to quash three subpoenas *duces tecum*
dated March 15, 1960,

—against—

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent-Appellee.

Docket No. 26326

In the Matter of the Application of

SILVIO GUTIERREZ,
Petitioner-Appellant,

to quash a subpoena *duces tecum*
dated April 18, 1960,

—against—

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Respondent-Appellee.

Docket No. 26327

In the Matter of the Application of

NAPOLEON DUPOUY,

Petitioner-Appellant,

to quash two subpoenas *duces tecum* dated March 15, 1960,

—against—

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Respondent-Appellee.

Before:

WATERMAN, MOORE and HAMLIN,*

Circuit Judges.

Consolidated appeals from an order of Chief Judge Ryan, United States District Court, Southern District of New York, which denied appellants' motions to quash subpoenas *duces tecum* issued by the Clerk of the Court, United States District Court, Southern District of New York, under an order of Judge Mathes, United States District Judge, sitting by designation in the Southern District of Florida, granting appellee "permission to resort to the deposition procedures provided in Rule 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including without limitations, procedure for subpoenas *duces tecum*, to secure evidence from any appropriate officials of First National City Bank of New York, of French American Banking Corporation, and Royal Bank of Canada, all in New York City."

Reversed.

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* Of the Ninth Circuit, sitting by designation.

[Appearances omitted]

MOORE, *Circuit Judge*:

The appellants are three banks, The First National City Bank of New York (City Bank), French American Banking Corporation (French American), the Royal Bank of Canada, and Silvio Gutierrez, a depositor with Chemical Bank New York Trust Company, and Napoleon Dupouy, a depositor in City Bank and French American. Appellants appeal from an order which denied appellants' motions to quash subpoenas *duces tecum* issued by the Clerk of the District Court for the Southern District of New York. Previously, United States District Court Judge Mathes of the Southern District of California, sitting as an extradition magistrate in the Southern District of Florida, had granted appellee "permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including, without limitations, procedure for subpoenas *duces tecum*, to secure evidence from any appropriate officials of First National City Bank of New York, of French American Banking Corporation, and Royal Bank of Canada, all in New York City."

Involved is an international extradition proceeding initiated by Manuel Aristeguieta, Consul General of the Republic of Venezuela, on behalf of appellee, the Republic of Venezuela (Venezuela), in which the return to Venezuela of Marcos Perez Jimenez, a former president of Venezuela, now in the State of Florida, is sought. The complaint filed by Venezuela in the Southern District of Florida charges Jimenez with a number of crimes alleged to have been committed in Venezuela, which are extraditable under the Treaty of Extradition between the United States and Venezuela (43 Stat. 1698). The crimes include four murders, the unlawful abstraction and misappropriation to his own personal use of large sums of money and the illegal receipt of various commissions, all to his illicit enrichment at the expense of the Republic of Venezuela.

More specifically, the complaint in substance alleges that the Attorney-General of Venezuela filed a bill of charges supported by voluminous documentary evidence in the Federal Court of Venezuela, that the Federal Court issued its warrant for Jimenez' arrest, that extradition documents legally authenticated have been filed here and incorporated therein by reference and that justification for extradition has been established as a matter of fact and law. Hearings, which have been conducted for some time before Judge Mathes, are still pending. During the course of the hearings, counsel for Venezuela served upon certain of the banks notices for taking depositions in New York together with subpoenas based thereon. The notices upon motion were vacated by order (Judge Choate) in Florida. This order in turn was vacated (also by Judge Choate) "in so far as it relates to the establishment of special rules governing procedure in the above styled case."

Thereafter, subpoenas were served in New York, returnable in Miami, Florida, requiring the banks to produce certain specified records. The banks responded by moving to quash; the motions were denied and thereafter an appeal was taken by the banks and others (including appellant depositors) to the United States Court of Appeals for the Fifth Circuit. The appellants there argued that subpoenas in an extradition proceeding could not properly be issued on behalf of the demanding country and, alternatively, that the particular subpoenas were invalid because they purported to extend the Court's process beyond 100 miles from the Court House in Miami, see Fed. Rules Civ. Proc. 45(o)(1). The United States filed a brief *amicus curiae* (as has been done in this court) contending that the power of an extradition magistrate includes nationwide compulsory process.

In the interest of expedition the Court of Appeals for the Fifth Circuit handed down a *per curiam* opinion, Chief Judge Rives dissenting, in which the grounds of decision

were not stated. The court simply concluded that the order of the District Court should be reversed and the subpoenas quashed. *Aristeguieta* v. *Jimenez*, 5 Cir., 1960, 274 F. 2d 206 (petition for certiorari docketed April 28, 1960). After complying with this mandate, Judge Mathes by order permitted Venezuela to avail itself of the deposition and subpoena procedure under the Federal Rules of Civil Procedure. Subpoenas have been issued in the Southern District of New York and the banks again have moved to quash. From Chief Judge Ryan's opinion denying the motions, appellants appeal.

The foundation for international extradition lies within a short statutory framework, 18 U. S. C. A. §§3184-3195, and whatever treaty is applicable to the foreign country seeking delivery. The treaty with Venezuela, *supra* (a fairly standardized version of comparable agreements with other nations) provides that upon requisition a person charged with any of the crimes specified in Article II shall be surrendered by the country of asylum.

The purpose of the Treaty is "to facilitate the course of punitive justice * * *; to prevent the impunity which would result from the escape of guilty persons and of their asylum in the territory of one or the other nation," and to provide for the extradition of the accused as well as the sentenced. The method agreed upon was "to deliver up to justice, by means of requisition duly made as herein provided, any person who may be charged with or may have been convicted of any of the crimes committed within the jurisdiction of one of the Contracting Parties and specified in Article II of this Convention, while said person actually was within such jurisdiction when the crime was committed, and who shall seek asylum or who shall be found within the territories of the other." To assure each contracting country of comparable criminal standards the surrender was to be made "only upon such evidence of guilt as, according to the laws of the country in which the

fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there" (Article I).

Section 3184, Title 18 United States Code, then empowers "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State" in whose jurisdiction the fugitive is found, to conduct (after apprehension and appearance) a hearing "to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty * * * he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State * * *."

Neither statutes nor decided cases furnish satisfactory guides as to procedures for obtaining proof upon extradition proceedings. However, the courts have compared these proceedings with

> "preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him." (*Benson* v. *McMahon*, 127 U. S. 457, 463 (1888).)

Adhering to this analogy, the question, thus, is whether probable cause has been established to suppose the fugitive guilty, *Glucksman* v. *Henkel*, 221 U. S. 508, 512 (1911); cf. Rule 5(c) of the Federal Rules of Criminal Procedure, *i.e.*, a *prima facie* case, *Charlton* v. *Kelly*, 229 U. S. 447 (1913).

It was early recognized that upon an extradition hearing the evidence necessary to make out a *prima facie* case would be located in the country where the crime was committed and that the object of extradition would be defeated if the demanding country were put to the onerous task of transporting witnesses in person to the United States (*Bingham* v. *Bradley*, 241 U. S. 511, 517 (1916)). Hence, 18 United States Code §3190 permits "depositions, warrants, or other papers or copies thereof" offered by the demanding government to be admitted in evidence if properly authenticated and certified that such evidence would be admissible in a like proceeding in the demanding country. The *ex parte* advantages of Section 3190 are not open to a defendant (*In re Luis Oteiza y Cortes*, 136 U. S. 330 (1890)), but he may offer limited evidence, admissible under recognized standards, to explain elements in the case against him (*Charlton* v. *Kelly*, *supra*). Moreover, Section 3191 provides, as to an indigent fugitive, where "there are witnesses whose evidence is material to his defense" and without whom "he cannot safely go to trial," the magistrate "may order that such witnesses be subpenaed" and the costs incurred and the fees of the witnesses "shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States."

Finally, if the magistrate finds the evidence insufficient, he may discharge the defendant although the demanding country may later institute a second proceeding (*Collins* v. *Loisel*, 262 U. S. 426 (1923)). If he finds probable cause established, he may bind over the defendant to the Secretary of State, who may, in his discretion, order the surrender (18 U. S. C. §3186).

First arises the question as to this court's appellate jurisdiction. Normally subpoena orders are interlocutory in nature and thus not appealable until the conclusion of the entire proceeding (*Cobbledick* v. *United States*, 309 U.S. 323 (1940)). However, the concept of finality is not inflexible. Because of the unicity of extradition, *viz.*, the

magistrate's determination is not passed upon by an appellate court but only by the Secretary of State,[1] appellants' contentions will never be reviewed if not now. A non-party witness, of course, generally cannot take part in the ultimate appeal of any case (*Alexander* v. *United States*, 201 U.S. 117 (1906)), but at least the precedential effect of an adverse district court ruling may be arrested at that time. In any event, the self-contained character of extradition suffices to render orders refusing to quash subpoenas issued in aid of the demanding country analogous to those orders which are ancillary to an administrative proceeding and therefore appealable.[2] See *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434 (1915).

The interrelated issues raised by the parties to this appeal may be summarized as follows:

(1) The banks contend that 18 U. S. C. §3190, which authorizes the admission in evidence of depositions and other papers certified abroad, is the exclusive evidentiary vehicle for the demanding country. They maintain that the basic principle and purpose of extradition presupposes that the demanding country must collect, in documentary form, all of its evidence at home and come to the country of asylum armed with a *prima facie* case. In support of the contrary position, Venezuela cites Article XI of the Treaty which provides for submitting to the asylum State the warrant of arrest in the country where the crime was committed and the depositions upon which such warrant may have been issued, "with such other evidence or proof as may be deemed competent in the case." Venezuela

[1] Limited collateral review, however, is available by way of habeas corpus, see *Fernandez* v. *Phillips*, 268 U. S. 311, 312 (1925), and most of the cases cited herein arose in that fashion.

[2] In holding the order of Judge Mathes denying the motion to quash the original subpoenas to be appealable, the Court of Appeals for the Fifth Circuit was unanimous.

contends that this refers to evidence in addition to that which was acted on in the demanding country and includes evidence which may be found in the United States. A contrary interpretation, it is argued, would frustrate the purpose of the Treaty by encouraging fugitives to remove and conceal here evidence of culpability. As additional authority for this position are a number of cases where evidence obtained in the United States was admitted at the extradition hearing. See, e.g., *McNamara* v. *Henkel*, 226 U. S. 520 (1913); *Argento* v. *Horn*, 6 Cir., 1957, 241 F. 2d 258, cert. denied 355 U. S. 818; *In re Henrich*, C. C. S. D. N. Y., 1867, 11 Fed. Cas. 1143, No. 6,369. The opinions in these cases, however, devote little discussion to the subject and the issue here raised has never been explicitly adjudicated.

(2) Conceding, in the alternative, that possibly witnesses in the United States may testify on behalf of the demanding country, the banks next argue that civil discovery cannot be availed of and that attendance cannot be compelled through use of a subpoena since there is nothing in the extradition treaties or statutes that would authorize the issuance of subpoenas at the behest of the demanding country. They assert that extradition is a non-judicial proceeding conducted before a magistrate, and is not a proceeding within the jurisdiction of a United States District Court or of any Court. Thus, they claim, extradition is neither a "suit of a civil nature" to which the Federal Rules of Civil Procedure would apply, nor a judicial proceeding to which any inherent power of a court would attach. Venezuela, on the other hand, contends that an extradition hearing has many of the attributes of a judicial proceeding; that the extradition magistrate thus has the usual powers of a judge; and that since the treaties and statutes do not spell out the procedural details of extradition, the magistrate may invoke his inherent power to provide himself with appropriate instruments required for the performance of his duties. In support of its posi-

tion that subpoena power exists, Venezuela cites 18 U. S. C. §3191, which provides for payment of costs and fees of witnesses subpoenaed by indigent fugitives, and contends that this statute discloses a Congressional assumption that the power of subpoena at the behest of the demanding country resides in the extradition magistrate. The banks argue that this section, at most, permits the magistrate to subpoena only on behalf of the accused fugitive and clearly does not give the demanding country a similar privilege.

(3) Appellants next urge that even if the extradition magistrate has the power to subpoena witnesses for the demanding country, he has no authority to authorize the demanding country to avail itself of the deposition-subpoena procedures provided for in the Federal Rules of Civil Procedure. Pointing out that the Federal Rules of Criminal Procedure are specifically declared to be inapplicable to extradition proceedings and that the Civil Rules should not be available in a quasi-criminal proceeding, appellants contend that in the absence of statute there is no power in the federal courts or judges to authorize the taking of depositions. In addition, appellants assert that the basic principle of extradition militates against permitting the demanding country to invoke the judicial processes of the United States in order to "discover" evidence to be used at home. Venezuela, although admitting in its brief that "the Rules [Civil Procedure] are not mandatory in extradition," nevertheless takes the position that "Within his discretion under Article XI the extradition judge may do what a district judge may normally do, when no particular procedure is prescribed for the case—he may follow as a model, in exercising his discretion, the pattern provided by the Federal Rules of Civil Procedure."

(4) Appellant Dupouy, while not joining completely in the position taken by the banks,[3] argues that, in any event,

[3] The other depositor-appellant, Gutierrez, joins in all the arguments. The standing of the depositors to challenge the subpoenas is not disputed.

the information sought under the subpoenas is not necessary to Venezuela's case.

Venezuela would thus vest the extradition magistrate with some inherent power, including the right to borrow from the Civil Rules, to fill a procedural vacuum in the extradition treaties and statutes. The ultimate issues posed for adjudication are thus (a) whether the extradition magistrate has the power to authorize the demanding country to use deposition-subpoena provisions as provided for in the Civil Rules, and (b) whether this case is appropriate for the exercise of such power.

Preliminarily, it may be noted that we are not called upon to approve of a situation where a court, in which the Federal Rules of Civil Procedure are not mandatory, has borrowed a relatively minor provision from these Rules. See *Union National Bank* v. *Lamb*, 337 U. S. 38 (1949), where the Supreme Court followed Rule 6 in computing the running of time for a filing of a petition for certiorari, and *Simon* v. *Commissioner of Internal Revenue*, 2 Cir., 1949, 176 F. 2d 230, where this court adopted Rule 6 to determine the timeliness of a petition to review a decision of the Tax Court. Nor are we faced with a situation where an extradition magistrate has filled in gaps in the extradition treaties and statutes by fashioning his own procedure in relation to minor and essentially collateral matters. See, for example, *In re Ludwig*, C. C. S. D. N. Y., 1887, 32 Fed. 774, which relates to continuances and adjournments, and *Wright* v. *Henkel*, 190 U. S. 40 (1903), which concerns the power to admit the fugitive to bail pending the hearing. Even a hasty glance at the complex and interrelated issues and arguments raised by the parties to this appeal clearly reveals that we are confronted with a basic procedural innovation having far reaching consequence in the field of international extradition.[4]

[4] The cases cited in the briefs and cases examined in independent research do not shed any authoritative light on the subject.

In this connection the recent Supreme Court decision of *Miner* v. *Atlass*, 363 U. S. 641 (1960), is significant. Holding invalid a District Court admiralty rule which authorized the taking of oral depositions for the purpose of discovery only, the Court stated:

> "The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U. S. C. §331 (advisory function of Judicial Conference), 28 U. S. C. §2073 (prior report of proposed rule to Congress), designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress as would now be required under 28 U. S. C. §2073." 363 U. S. at 650.

The *Miner* case, of course, is not cited as authority that the procedural innovation sought to be used in this case is or is not within the rule-making power of the Supreme Court, or that the extradition magistrate may or may not be authorized to order the taking of depositions under any circumstances. Implicit in *Miner*, however, is the warning that federal courts must proceed with extreme caution when asked to sanction basic procedural innovations which lie in that misty land where judicial and legislative powers meet.[5] Moreover, when called upon to justify such innova-

[5] For cases which indicate that in the absence of statute there exists no power to authorize pre-trial depositions, see *Hanks Dental Assn.* v. *International Tooth Crown Co.*, 194 U. S. 303 (1904);

tions on the basis of inherent power, the courts should be doubly cautious that the exercise of this power is appropriate to the particular case. Although neither the Treaty nor the statutes provide for the taking of depositions in the asylum country, Venezuela argues that "Certainly the extradition judge must be, and under the Treaty is, free to establish some method of proceeding." Such a principle would give to each individual judge unlimited power on an *ad hoc* basis to create whatever procedure he might choose. Procedural chaos could easily result. The Federal rules both criminal and civil were carefully drafted to avoid such a situation. In all likelihood the number of occasions for international extradition was not sufficiently large to justify the codification of procedural rules which should apply thereto. In a field as important from a national foreign policy point of view, it should not be the function of judges individually or collectively to write such a code. If there are to be "procedural innovations" of general application, they should come as suggested by the Supreme Court (363 U. S. 641, 650) "only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." Until such time as a procedural code of general application in international extradition is written, we are convinced that any power in the extradition magistrate to create his own rules or procedures should be limited to situations where the exercise of that power is essential in the particular case. Thus, before deciding what, if any, power resides in the extradition magistrate to authorize depositions, it is necessary to determine what circumstances might justify the use of this supposed power, and whether these circumstances exist in the instant case.

Heister v. *Lehigh & N. E. R. Co.*, 50 F. 2d 928 (D. C. S. D. N. Y., 1931); *Tobacco and Allied Stocks* v. *Transamerica Corp.*, 16 F. R. D. 545 (1954).

Even under the liberal provisions of the Civil Rules, certain courts have indicated that when a party seeks the production of documents under Rules 34 or 45, some showing of need is necessary after the proper objection has been made.[6] The Federal Rules of Criminal Procedure, which, of course, are not directly applicable to extradition (see Rule 54(b)(5), but which are available for analogy purposes,[7] provide for the taking of depositions to be used at trial only when necessary "to prevent a failure of justice." Rule 15(a). As was stated by the Advisory Committee on the Rules:

> "Unlike the practice in civil cases in which depositions may be taken as a matter of right * * * it was contemplated that in criminal cases depositions would be used only in exceptional situations." Note to preceding Rule 15, 18 U. S. C. A.[8]

It is also not without significance that the United States Government, which in federal criminal prosecutions is in some respects in a position similar to the demanding country in an extradition proceeding, cannot avail itself

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[6] Compare *Boeing Airplane Co.* v. *Coggeshall*, D. C. Cir., 1960, 280 F. 2d 654, with *Connecticut Mutual Life Insurance Co.*, D. C. S. D. N. Y., 1955, 17 F. R. D. 273.

[7] Extradition proceedings have been referred to by the Supreme Court as being of a criminal nature. See *Grin* v. *Shine*, 187 U. S. 181 (1902); *Rice* v. *Ames*, 180 U. S. 371 (1901).

[8] See also 18 U. S. C. A. § 3191, which authorizes the extradition magistrate to subpoena witnesses for indigent fugitives when the fugitive cannot "safely go to trial without such evidence." In *Gallina* v. *Fraser*, D. C. Conn., 1959, 177 F. Supp. 856, aff'd 2 Cir., 1960, 278 F. 2d 77, cert. den. 364 U. S. 851, the Court, in holding that the extradition magistrate did not abuse his discretion in denying the fugitive's motion to subpoena witnesses pursuant to § 3191, stated that the subpoena should be ordered in situations where "the evidence sought indicates that the person charged will be denied a fair hearing unless the witnesses are produced." *Id.* at p. 869.

of the deposition privilege made available to defendants by Criminal Rule 15. The unavailability of this procedure to federal prosecutors indicates that even if the demanding country should not be denied the privilege absolutely, nevertheless whatever deposition privilege may be granted to the demanding country should be exercisable only in exceptional situations where a strong showing of need is made.

Nor is the policy favoring and facilitating extradition (see *Factor* v. *Laubenheimer*, 290 U. S. 276 (1933); 1 Hyde, International Law §310 (1922); 48 Yale L. J. 701 (1939)) frustrated by so limiting whatever deposition-subpoena privilege that may exist. An examination of the extradition treaties, statutes, and decisions reveals that the procedural framework of international extradition gives to the demanding country advantages most uncommon to ordinary civil and criminal litigation. First, 18 U. S. C. §3190, permits the demanding country to introduce properly authenticated and certified *ex parte* depositions, etc., gathered at home. Second, the *ex parte* advantages of §3190 are not available to the defendant, *In re Luis Oteiza y Cortes*, 136 U. S. 330 (1890). Third, the defenses available to the fugitive are extremely limited: he cannot, for example, introduce evidence which contradicts the demanding country's proof (*Collins* v. *Loisel*, 259 U. S. 309 (1922); *Charlton* v. *Kelly*, 229 U. S. 447 (1913)); evidence to establish alibi (*Desmond* v. *Eggers*, 9 Cir., 1927, 18 F. 2d 503, motion to stay execution denied, 274 U. S. 722; *In re Wadge*, 15 Fed. 864 (1883)); evidence of insanity (*Charlton* v. *Kelly*, 229 U. S. 447 (1913)); and evidence that the statute of limitation has run (*Hatfield* v. *Guay*, 1 Cir., 1937, 87 F. 2d 358, cert. denied 300 U. S. 678). Fourth, the actual guilt of the fugitive does not have to be established, but instead the demanding country need show only probable cause that he is guilty. *Benson* v. *McMahon*, *supra*. Thus, while liberal deposition procedures in civil litigation may be favored by the courts, it is obvious that because of these procedural advantages

the demanding country's need to invoke the judicial process of the United States to gather evidence of culpability would arise only in the extraordinary case. It would be a perverse doctrine indeed which would hold that where the peculiarities of a juridical area require extending to a party extraordinary remedies, necessarily other extraordinary remedies must be readily granted.

We thus turn to the crucial question in this case, namely, has Venezuela shown such exceptional circumstances as would justify the granting of the depositions it seeks. The complaint filed by Venezuela charges Jimenez *inter alia* with various financial crimes involving misappropriation of public funds in violation of various provisions of the Penal Code of Venezuela. The supporting documents, totalling approximately 2,000 pages, filed in the extradition hearing, include charges by the Attorney General of Venezuela, the finding of the highest court of that country that the charges and evidence establish cause for prosecution and arrest, the warrant of arrest of that court, and a substantial quantity of evidence submitted to that court.[9]

According to counsel for Venezuela, the evidence discloses that many of the illegal financial transactions charged were accomplished with the assistance of others using facilities of certain banks in the United States, including the banks involved in these appeals. Asserting that Jimenez has on deposit in United States banks about $4,400,000, Venezuela claims that these depositions will serve the following purpose:

> "Existing sources will trace to its illegal sources about $500,000 of these deposits. The record of the banks to which the deposition subpoenas are directed will assist in tracing the balance to its sources, and there is every likelihood that these records will disclose significant additional deposits."

[9] Reserving the right to move to open at a later date, counsel for Venezuela told Judge Mathes it was resting on that record.

Although at the hearing below and at the proceedings in Miami it was determined that the evidence sought by the depositions was material and relevant, no determination has yet been made that this evidence is necessary to Venezuela's *prima facie* extradition case. The application to take depositions is directed towards the crime of "Embezzlement or criminal malversation" and under Article II of the Treaty the amount embezzled to constitute an extraditable offense must exceed $200 (USA) or B.1,000 (Venezuela). Without further discovery, Venezuela already has existing sources which will trace about $500,000, an amount far in excess of the statutory requirement. Naturally, Venezuela would like to trace the balance of the alleged $4,400,000 which it believes may be on deposit in American banks. It also hopes that the depositions "will disclose significant additional deposits." However, the extradition hearing is not the occasion on which the accused's guilt is to be established with the certainty and finality as would be required upon the actual trial. Were this a proceeding in our courts for the discovery of assets, the relief granted might well be proper. But this is not such a proceeding. If, as Venezuela has indicated, it is willing to rest its case upon the record already made, the additional evidence sought would appear to be merely cumulative. Nor has any showing been made as to how $4,400,000 will exceed in legal effectiveness, insofar as meeting the statutory requirement of over $200 is concerned, the $500,000 already claimed by Venezuela. Since at this stage there is no present showing of need, it would be unwise in the absence of more specific statutory command or direction to sanction such broad deposition proceedings as are now sought.

The orders are reversed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of December one thousand nine hundred and sixty.

Present:

HON. STERRY R. WATERMAN, HON. LEONARD P. MOORE, HON. OLIVER D. HAMLIN, *Circuit Judges.*

In the Matter

of

the application of

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA, *Appellants.*

Appeal from the United States District Court
for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed, with costs to the appellants.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of December one thousand nine hundred and sixty.

Present:

HON. STERRY R. WATERMAN, HON. LEONARD P. MOORE, HON. OLIVER D. HAMLIN, *Circuit Judges.*

In the Matter

of

the application of

SILVIO GUTIERREZ, *Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed, with costs to the appellant.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of December one thousand nine hundred and sixty.

Present:

HON. STERRY R. WATERMAN, HON. LEONARD P. MOORE, HON. OLIVER D. HAMLIN, *Circuit Judges.*

In the Matter

of

the application of

NAPOLEON DUPOUY, *Appellant.*

Appeal from the United States District Court
for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed, with costs to the appellant.

A. DANIEL FUSARO
Clerk

APPENDIX 2

Opinion and Order of Judge Ryan, United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 8-85

In the Matter of the Application of

THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION and THE ROYAL BANK OF CANADA to quash three subpoenas duces tecum dated March 15, 1960.

M 11-188

In the Matter of the Application of

NAPOLEON DUPOUY to quash two subpoenas duces tecum dated March 15, 1960.

M 8-85

In the Matter of the Application of

SILVIO GUTIERREZ to quash a subpoena duces tecum dated April 18, 1960.

(Appearances omitted.)

We have before us in this international extradition proceeding several motions, each addressed to the subpoenae duces tecum issued by this Court to four separate banking institutions transacting business in this District, commanding them to appear in this Court to give testimony and produce records of accounts maintained with them by

the defendant and others. The testimony is sought for use in the United States District Court for the Southern District of Florida, Miami Division, on a hearing to be held on a complaint pending in that Court and filed pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698 (1923), and the applicable extradition statute, 18 U. S. C. Section 3184, by respondent, Manuel Aristeguieta, Consul General of Venezuela in Miami, on behalf of his government, the Republic of Venezuela, against Marcos Perez Jimenez, a citizen of Venezuela charged with certain financial crimes (among others) in that country. The questions of law presented are common to all motions; we have considered them simultaneously.

Motions have been made by the banks and by two depositors whose accounts are the subject of the subpoenae. The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada, all served within this District, have jointly moved in one motion to quash subpoenae served upon them. Napoleon Dupony, a depositor of The First National City Bank of New York and of French American Banking Corporation, whose accounts with those banks are a subject of the subpoenae addressed to those banks, has separately moved to quash the subpoenae served upon these banks in so far as they concern the record of his accounts and transactions with the banks.

Chemical Bank New York Trust Company has not moved with reference to the subpoena served upon it; however, Silvio Gutierrez, a depositor whose account is a subject of the subpoena served upon that bank, has moved to quash the subpoena.

The subpoenae issued pursuant to *Rule 45(d) F. R. C. P.* and our jurisdiction to hear and determine these motions is granted by *Rule 45(b) F. R. C. P.* which gives the "Court .... upon motion made .... at or before the time specified .... for compliance (authority) to quash or modify the

subpoenae." Rule 45(d) is specifically made subject to Rule 45(b) when subpoenae duces tecum are involved and there is no limitation in Rule 45(b) as to which Court may grant this relief. (Cf. *Shawmut, Inc.* v. *American Viscose Corp.*, 11 F. R. D. 562; *Underwood* v. *Maloney*, 15 F. R. D. 104.) The District Court in Florida expressly recognized the authority of this Court and in effect directed that motions to quash be made returnable here. (Hearing of March 7, 1960, transcript p. 335)

All of the motions challenge the power or authority of this District Court to issue subpoenae duces tecum to compel the attendance of witnesses and the production of records in a hearing on a complaint filed in an international extradition proceeding. We hold this authority to be clear and unquestionable.

The subpoenae were issued and served under an order of the District Court for the Southern District of Florida, Miami Division, entered on March 9, 1960 upon motion of the Consul General granting to him permission to resort to the deposition procedure of Rules 26 and 45 and related provisions of the Federal Rules including procedure for subpoenae duces tecum. These subpoenae directed to the banks were originally made returnable on April 18, 1960; and an additional subpoena served on the Chemical Bank of New York, along with a notice to take its deposition, was made returnable on May 10, 1960.

Before this, The First National City Bank, French American Banking Corporation and The Royal Bank of Canada had been served with subpoenae duces tecum issued by the Clerk of this Court to appear for the taking of their depositions in New York. On November 12, 1959, The First National City Bank moved in the District Court of Florida for a protective order under *Rule 30(b), F. R. C. P.*, on the ground that the respondent Consul General had not complied with *Rule 15, F. R. Crim. P.* That motion was granted by a Judge of that Court, who by order of November 13,

1959, vacated the subpoena and notices on the ground that the Federal Criminal Rules should apply to the proceeding. Later, upon petition of respondent, that Court vacated its order and entered a further order that the Court might provide for the taking of testimony by deposition and subpoena, which was premised upon the conclusion that the procedure for the examination of witnesses was not to be restricted by the Federal Rules, and that under the provisions of the Treaty the right to subpoena existed.

Following a hearing before Judge Mathes, the respondent, Consul General, filed a motion pursuant to Section 3184, Title 18, U. S. C., and under the Treaty for an order, in the nature of a subpoena, requiring the banks to appear and to produce in the Florida District Court the documents which had been sought by the prior subpoenae. The Court issued such an order and subpoenae were served by the Marshal of the District Court of Florida upon the banks here in New York.

On December 14, 1959, all the movants here moved to quash the subpoenae; the motion was denied but the subpoenae were modified in respects not here important. An appeal was taken by the banks and these two depositors (among others) from this order denying petitioners' motion, on the grounds that the Court had no power to issue subpoenae in an extradition proceeding and in any case no power to issue subpoenae to be served on persons residing beyond 100 miles from the Court's situs. The United States on this appeal filed a brief amicus curiae urging the Court's power to issue compulsory process in extradition proceedings. On February 1, 1960, the Court of Appeals for the Fifth Circuit (Chief Judge Rives, dissenting) concluded that the District Court's order should be vacated and the subpoena quashed.

On March 7, 1960, respondent, Consul General, moved to take depositions of these banks pursuant to subpoena duces tecum calling anew for the production of the docu-

ments as in the prior subpoenae. Judge Mathes held that the order of the Court of Appeals was limited to the question of the power of the District Court to issue subpoenae returnable before it served on persons residing beyond 100 miles, and that under the Treaty and the extradition statute, unwilling witnesses could be compelled to give evidence within the territorial limitations provided by the Civil Rules. Judge Mathes granted the relief sought and specifically reserved to the Court in this District all matters concerning the scope of the subpoenae and depositions and even the question of a stay of the subpoenae. Judge Mathes made it clear that he was granting permission simply to secure and serve the subpoenae requested. The subpoenae have been issued by the Clerk of this Court.

We should also note that the banks and depositor Dupouy petitioned the Court of Appeals of the Fifth Circuit for a writ of prohibition or mandamus to vacate this order urging that Judge Mathes acted in contravention of the prior order of vacatur of the Court of Appeals. On March 25, 1960, the Court of Appeals denied the petition, stating that the propriety of the action of the District Court "was not before this Court nor decided by it and is not contrary to the mandate." Since that time the depositor Gutierrez, after an unsuccessful attempt in the District Court of Florida to quash the notice of deposition and subpoena duces tecum served on the Chemical Bank, has filed an appeal to the Court of Appeals in the Fifth Circuit.

On the motions now before this Court, the same objections as those urged in the Court of Appeals are again urged.

The final complaint filed herein alleges the commission by the defendant of crimes in Venezuela by a citizen of that country in violation of its penal laws. The complaint meets the statutory requirements of Section 3184, Title 18, United States Code, and charges the defendant with the commission of crimes for which extradition may be re-

quested under the Extradition Treaty with Venezuela. The jurisdiction of the District Court in Florida to proceed under the provisions of Section 3184, Title 18, United States Code, is not questioned on these motions. That Court has a proper complaint before it; the defendant has been found within its territorial jurisdiction and he has been apprehended and brought before it "to the end that the evidence of criminality may be heard and considered." The depositions sought to be taken on the return of the subpoenae now before us and the documents and records sought to be produced, the requesting Government represents, will be "evidence of criminality" it intends to submit in support of extradition and of its pending complaint.

Section 3184 provides that if the Judge before whom the alleged fugitive is brought, after hearing, "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty," he is to certify his finding, with the record, to the Secretary of State; thereupon, on proper requisition, the Secretary of State may surrender the accused to the foreign government.

Article I of the Treaty with Venezuela provides that surrender of the alleged fugitive may be made "only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there." 43 Stat. 1698, 1699. Article XI of the Treaty provides that the evidence submitted at the hearing may include the depositions upon which the warrant of arrest issued and other competent evidence, and that the "judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested." 43 Stat. 1698, 1704.

The functions and duties of the District Judge before whom the complaint is pending and will be heard are somewhat comparable to those of a committing magistrate;

he will not, of course, adjudge the guilt or innocence of the alleged fugitive of the crimes charged by the requesting country, but he, after hearing, shall act if "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention." (Section 3184) *Charlton* v. *Kelly*, 229 U. S. 447; *Orteiza y Cortes* v. *Jacobus*, 136 U. S. 330, 334-335.

The District Court here functions in a judicial capacity; he is charged with the making of a judicial determination. In accordance with our fundamental concepts of justice and of due process, he must hold public hearings; the accused must be given due notice of the hearings and be afforded full opportunity to be heard, with limitation only as to the issues presented for determination. Neither the District Judge, nor this Court which acts only in an ancillary capacity, is bound by either the federal criminal or civil rules when they are found to be in conflict with the terms of the treaty or of Section 3184.

There is no limitation or requirement in the statute or the Treaty that the other competent proof or evidence referred to in Article XI be in possession of respondent, Consul General, at the time of the filing of the complaint, or that it have been obtained by him in the demanding country; and he is free to present other evidence available to him in the asylum state. It is certainly contemplated that the proof submitted on the hearing by a requesting sovereign, in addition to the documents and foreign underlying depositions, may well include the oral and written testimony of witnesses; for, again, there is no limitation.

We see, therefore, no justification for limiting respondent to the testimony of willing witnesses and precluding the obtaining of this same evidence when the witnesses are unwilling, or because of the inability of the hearing magistrate to compel appearance personally before him. Certainly the power to compel such attendance is explicitly assumed in Section 3191 on behalf of an indigent defendant.

It can not be argued logically that it ceases to exist when it is the complainant who seeks to invoke it, or an accused with means. It follows that, if the Court has the power to order the testimony of witnesses within its reach, it can order this same testimony when the witnesses are beyond its territorial reach. As the District Judge observed when granting the application to take these depositions, it would not be practical to so limit extradition hearings under Section 3184.

It is the asylum state which dictates the legal formalities to be complied with by the respondent. It does not make for justice to hold that the hands of the "judicial functionaries" are so tied while the burden of establishing probable cause to the satisfaction of the Judge is cast on respondent and, at the same time, that he is precluded from applying the ordinary procedures made available by the asylum state. Article XI

Although the District Court gave respondent permission to invoke Rules 26 and 45, F. R. C. P., and related rules of discovery, it is clear from the record before it, from the affidavits submitted in support of the subpoenae and from the subpoenae themselves that respondent's right is limited to the presentation of relevant and material probative evidence in support of its charge of embezzlement and criminal malversation. Neither that Court nor this one holds that, in order to fulfill the statute and the Treaty, we are to accord respondent the limitless right of sweeping discovery afforded our litigants by our civil rules in the hope of discovering evidence to support its complaint, or that the process of this Court may be used in this proceeding solely to investigate whether a crime charged was committed in a foreign country.

The materiality and relevancy of the evidence sought and its probable existence in the hands of the banks in question was demonstrated by the extradition documents, respondent's affidavit and the oral hearing before the Dis-

trict Court to the satisfaction of that Court which described it as evidence "to show that certain funds were taken out of the country, namely, the Republic of Venezuela, and brought to this country and channeled back to the defendant for his use and benefit."

Just as an indigent accused's right to obtain and summon evidence and proof is circumscribed by Section 3191 in that he must show what he "expects to prove", the materiality of the evidence, and his need of it on the hearing (*Orteiza y Cortes* v. *Jacobus, supra*) so is the respondent's right limited. But it is clear that if a right exists on the part of an accused to explain ambiguities or doubtful elements in the prima facie case made against him and to have witnesses produced for the purpose of explaining matters referred to by the witnesses for the accuser (*Collins* v. *Loisel*, 259 U. S. 309; *United States* v. *Whitem*, Fed. Cases #16, 685, 28 Fed. Cas. 588), a concomitant right must exist on the part of the accuser to have witnesses for the purpose of explaining away ambiguities or doubts on the issues of the commission of the crime and the defendant's implication in it.

It is not for this Court or for movants to question whether in fact respondent has in his possession now more than sufficient proof to meet the requirements of probable cause, or whether he is in fact simply seeking to place on record additional evidence for ultimate use on the trial in Venezuela. He has not rested his case and the Court, which is to finally determine the weight and effectiveness of the respondent's evidence, has given him permission to gather this particular evidence for presentation in the extradition proceeding. That is a matter solely within the discretion of that Court, which in extradition hearings is to be given wide latitude unhampered by formal rules. *Charlton* v. *Kelly, supra.*

A proper interpretation of our obligations under a covenant willingly entered into to assist another friendly nation

in furthering the ends of justice, as conceived and adhered to by civilized nations, will fulfill the purpose and underlying philosophy of our Government and people to a greater extent than will a technical attitude whereby our assistance is grudgingly extended.

We conclude that under Section 3191 of the Statute and Articles I and XI and on the record the District Court had the power to issue the subpoenae before us.

The motions to quash are, therefore, denied.

Extradition proceedings have been repeatedly compared with preliminary commitment proceedings. *Charlton* v. *Kelly supra; Benson* v. *McMahon*, 127 U.S. 457 (1888); and have many of the indicia of a criminal proceeding. *Rice* v. *Ames*, 180 U.S. 371; *Green* v. *Shine*, 187 U.S. 181. We feel that defendant has a right to be present and represented by counsel at any public proceeding held by this Court. (Cf. *Rule 43 of the Rules of Criminal Procedure.*) Defendant has the permission of the Florida District Court to "go to the place, and be in attendance, at the taking of each such deposition" (Order of March 9, 1960).

Since both Rule 30(d) F. R. C. P. and Judge Mathes' order of March 9th empower this Court to limit and control the taking of these depositions and in order to facilitate and expedite these hearings, a Judge of this Court should preside at all hearings.

Therefore, the Consul General shall enter an order incorporating the procedure outlined above, scheduling dates acceptable to all parties and arranging hearings before us in a courtroom within this District.

Settle order on notice.

Dated: May 13th, 1960

/s/ Sylvester J. Ryan
U. S. D. J.

[SAME TITLE]

ORDER DENYING MOTIONS TO QUASH SUBPOENAS

The Application of The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada to quash three subpoenas duces tecum dated March 15, 1960, having come on by motion to be heard before the Court on April 14, 1960; the Application of Napoleon Dupouy to quash the two subpoenas duces tecum dated March 15, 1960, directed to The First National City Bank of New York and French American Banking Corporation, having come on by Order to Show Cause to be heard before this Court on April 14, 1960, together with the Application by the three banks; by order of Chief Judge Ryan dated April 20, 1960, both Applications having been submitted on briefs and further argument continued to await directions of Chief Judge Ryan; the Application of Silvio Gutierrez, dated April 21, 1960, to quash a subpoena duces tecum dated April 18, 1960, directed to the Chemical Bank New York Trust Company having been assigned to Chief Judge Ryan for consideration with the aforementioned Applications and having been submitted on briefs; the deposition dated fixed in the subpoenas directed to The First National City Bank of New York, French American Banking Corporation and The Royal Bank of Canada having been April 18, 1960 and by order of Chief Judge Ryan dated April 20, 1960, having been continued to May 10, 1960; the deposition date fixed in the subpoena directed to the Chemical Bank New York Trust Company having been May 10, 1960; on application of Silvio Gutierrez, the deposition of Chemical Bank New York Trust Company having been stayed by the Court, and the other depositions having been postponed by acquiescence of the parties, pending decision by the Court and entry of a final order in the above-entitled applications; and a further hearing herein having

been held on May 13, 1960, counsel for all parties making the above-entitled applications having been present, it is

ORDERED that the above-entitled applications are denied for the reasons set forth in the opinion of the Court dated May 13, 1960;

ORDERED that the time for taking the depositions of The First National City Bank of New York, French American Banking Corporation, The Royal Bank of Canada and Chemical Bank New York Trust Company by the officials designated in and pursuant to the aforesaid subpoenas duces tecum is hereby continued to June 22, 1960, on which day said banks shall appear at 10:00 A. M. in Room 129 at the United States Courthouse, Foley Square, New York, New York, prepared to give testimony and to produce the documents and things set forth in the schedule attached to the respective subpoenas served on them;

ORDERED that a Judge of this Court shall preside over the taking of the aforesaid depositions and all hearings and proceedings in connection therewith;

ORDERED that Marcos Perez Jimenez, the defendant in the extradition proceeding now before the Honorable Judge William C. Mathes sitting by special assignment in the United States District Court for the Southern District of Florida, and his counsel are permitted to attend all of the aforesaid proceedings and depositions; and

ORDERED that the application of counsel for all parties making the above-entitled applications for a stay of proceedings pursuant to the aforesaid subpoenas until an appeal is taken and/or during the pendency of any such appeal is hereby denied.

Dated: May 16, 1960

/s/ SYLVESTER J. RYAN
SYLVESTER J. RYAN
Chief Judge

(Filed in Clerk's Office, United States District Court for the Southern District of New York, on May 16, 1960.)

APPENDIX 3

Orders of Judge Mathes, Dated March 9, and April 7, 1960, United States District Court for the Southern District of Florida, Miami Division

IN THE
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

ORDER GRANTING PERMISSION TO TAKE DEPOSITIONS

The plaintiff prior to March 7, 1960, filed in this Court a Motion for Permission to Take Depositions, accompanied by a certificate of service showing service by mail on February 25, 1960, on counsel for certain persons, including the three banks referred to herein, who might be affected by such motion. After argument on March 7 and 8, 1960, by counsel for the plaintiff, in support of such Motion, and by counsel for the defendant, counsel for the First National City Bank of New York, French American Banking Corporation and Royal Bank of Canada, and counsel for certain depositors in such banks, in opposition to such Motion,

And the Court being of the opinion that the decision of the United States Court of Appeals for the Fifth Circuit in the case referred to in such Motion (No. 18176, order entered Feb. 1, 1960) was limited to the question before that Court, that is the question of the power of this Court to issue subpoenas, returnable before this Court in Miami, Florida, to be served upon persons in New York City more than 100 miles from Miami, Florida,

And the Court being of the further opinion that, under the Treaty and statutes here involved, procedure for the securing of evidence from persons unwilling to produce evidence voluntarily should be and is available in the manner provided in Rules 26 and 45, and related provisions of

the Federal Rules of Civil Procedure, for the taking of depositions of witnesses pursuant to subpoenas, including subpoenas duces tecum, in accordance with the territorial limitations provided in such Rules,

And the Court being of the further opinion that, in the particular circumstances of this case and in the light of the charges being made herein by the plaintiff, the proceedings held in this case, and the showing heretofore made by the plaintiff, the taking of such depositions in such manner of officials of the banks specified herein should be permitted in this case,

It is ORDERED, ADJUDGED AND DECREED that:

(a) The plaintiff be and hereby is granted permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure, including, without limitation, procedure for subpoenas duces tecum, to secure evidence from any appropriate officials of First National City Bank of New York, of French American Banking Corporation, and Royal Bank of Canada, all in New York City;

(b) In connection with a return to such subpoenas duces tecum as may be issued, the aforesaid banks, in the examination of their records and the preparation of information or copies thereof, may incur unusual expenses which would not be covered by the usual witness fees as usually allowed in transactions of this type; if so any of such banks claiming such unusual expenses may file a motion with this Court setting forth a complete statement of their time and services rendered and the expense thereof, and, unless such expenses can be stipulated to and paid by plaintiff, this Court reserves the right, upon appropriate notice and hearing, as a condition to the issuance of such order, to fix a reasonable amount for the reimbursement of said expenses; and

(c) The defendant be and hereby is permitted by this Court to go to the place of, and to be in attendance at, the taking of each such deposition.

DONE AND ORDERED this 9th day of March, 1960.

/s/ WM. C. MATHES
United States District Judge

[SAME TITLE]

ORDER ON PLAINTIFF'S MOTION FOR PERMISSION TO TAKE DEPOSITION OF CHEMICAL BANK NEW YORK TRUST COMPANY

Plaintiff having presented his motion, dated March 31, 1960, for permission to take the deposition of Chemical Bank New York Trust Company, and the motion having been considered and submitted for decision;

IT IS ORDERED that the motion is hereby granted upon the same grounds and for the same reasons, and upon and subject to the same conditions as are set forth in the order of this Court, dated March 9, 1960, granting plaintiff herein permission to take the depositions of three other New York banks specified in said order; and all such provisions and conditions of said order of March 9, 1960, including the provisions therein as to reimbursement of the banks for unusual expenses, are hereby incorporated by reference herein.

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

WM. C. MATHES
United States District Judge

April 7, 1960

APPENDIX 4

Second Amended Complaint for Extradition

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

Second Amended Complaint for Extradition

Comes now MANUEL ARISTEGUIETA, the plaintiff herein and the Consul General of the Republic of Venezuela for the States of Florida, Georgia and South Carolina, duly appointed and acknowledged by the Government of the Republic of Venezuela and duly recognized by the Government of the United States of America, and makes this, his second amended complaint for extradition, in which he alleges as follows:

1. The plaintiff is located in and has his office in Miami, Florida.

2. The defendant is Marcos Perez Jimenez, a citizen of the Republic of Venezuela, over forty years of age, now to be found in Miami Beach, Florida, within the territorial jurisdiction of this Court.

3. This Court has jurisdiction of this cause by virtue of 18 U.S. Code 3184 and the Treaty of Extradition of January 19, 1922, between the Governments of the Republic of Venezuela and of the United States of America proclaimed January 2, 1924, appearing in 43 Stat. 1698, and now in full force and effect.

4. The defendant has been duly charged by appropriate proceeding in the Republic of Venezuela with having committed, while he was actually in Venezuela certain common crimes, specifically referred to hereinafter.

5. The complaint herein was made on instructions to the plaintiff from the Chargé d'Affaires, a.i., of the Republic of Venezuela in Washington, D. C. The amended complaint herein and amendments No. I and II thereto were made on instructions to the plaintiff from the Ambassador of the Republic of Venezuela in Washington, D. C. This second amended complaint is made on instructions to the plaintiff from the Ambassador of the Republic of Venezuela in Washington, D. C.

6. On August 23, 1959, the Chargé d'Affaires of the Republic of Venezuela in Washington, D. C., presented a note to the Secretary of State of the United States requesting the provisional arrest and detention, with a view to extradition, of the defendant. On the same date, Mr. R. R. Rubottom, Assistant Secretary of State for Latin American Affairs, on behalf of the Secretary of State, replied to that note, stating that, after the defendant's "provisional arrest and detention upon complaint made by a diplomatic or consular officer of Venezuela and the procedure provided in Section 3184 of Title 18 of the United States Code, the Department of State will be pleased to consider a formal request for extradition." A copy of the note on behalf of the Secretary of State is attached to the amended complaint as Exhibit A and is incorporated in this second amended complaint by reference. [The note is omitted in this Appendix.]

7. On August 24, 1959, the Embassy of the Republic of Venezuela in Washington, D. C., received from the Government of the Republic of Venezuela the extradition documents in this matter. Such documents are described below in paragraph 12 of this second amended complaint.

8. Thereafter the complaint herein was sworn to and filed by the plaintiff on August 24, 1959.

9. On August 25, 1959, the aforesaid Chargé d'Affaires delivered a note to the Secretary of State of the United States requesting the extradition of the defendant and transmitting the aforesaid extradition documents. A copy of an accurate English translation of this note is attached to the amended complaint as Exhibit E and is incorporated herein by reference. On the same date, Colonel John M. Raymond, Deputy Legal Adviser to the Secretary of State, on behalf of the Secretary of State, replied to such note, acknowledging the formal request for extradition and returning the extradition papers "in order that they may be presented by a diplomatic or consular officer of Venezuela to an appropriate judge or commissioner in the United States in connection with" the hearing provided in 18 U.S. Code 3184. A copy of this reply is attached to the amended complaint as Exhibit F and is incorporated herein by reference. [The exhibits are omitted in this Appendix.]

10. On September 11, 1959, plaintiff swore to an amended complaint and such amended complaint was filed herein on September 24, 1959. On November 23, 1959, the plaintiff swore to and filed amendments No. I and II to such amended complaint.

11. The aforesaid extradition documents were received by the Embassy of the Republic of Venezuela in the original Spanish, with no English translation. Translation of the 300 pages of Spanish text was completed in October, and the documents were filed in this Court, in Spanish and English translation, on October 21, 1959.

12. Such extradition documents contain the record of the following proceeding under the laws of the Republic of Venezuela:

The Attorney General of the Nation filed a bill of charges against the defendant in the Federal Court of the Republic on July 23, 1959. The charges were supported by voluminous documentary evidence.

After consideration of the charges and the supporting evidence the Federal Court decreed on July 30, 1959, that sufficient cause had been established for the arrest and trial of the defendant on such charges. In the same order the Federal Court retained jurisdiction until a final judgment should be rendered.

On August 12, 1959, the Federal Court issued its warrant for the arrest of the defendant on such charges.

On August 13, 1959, the Federal Court determined that the National Executive of the Republic of Venezuela should request the extradition of the defendant from the United States of America or from any country in which he might be found.

In addition to the Attorney General's bill of charges and orders of the Federal Court described above, the extradition documents include considerable excerpts from the evidence that was before the Federal Court and the text of relevant provisions of the Venezuelan Code of Criminal Procedure and Penal Code.

The extradition documents are properly and legally authenticated. The documents, filed in this Court as heretofore stated, are incorporated herein by reference.

13. On November 10, 1959, the Federal Court issued an order clarifying its aforesaid determination of August 13, 1959. The Federal Court stated therein that the extradition of the defendant from the United States is requested under all relevant paragraphs of Article II of the aforesaid Treaty of Extradition between Venezuela and the United States, including without limitation, paragraphs 1, 2, 14, 18, 20 and 21 thereof, and that in its original deter-

mination the listing of paragraphs 1, 2, 14 and 21 of Article II was intended as illustrative and not exhaustive.

Such order of November 10, 1959, is properly and legally authenticated. A copy thereof was attached to amendment No. II to plaintiff's amended complaint herein as Exhibit N; a copy of the English translation thereof was attached to amendment No. II as Exhibit O, and a copy of the translator's affidavit was attached as Exhibit P. The aforesaid copies are incorporated herein by reference. [Exhibits omitted in this Appendix.]

14. In its aforesaid determination that the extradition of the defendant should be requested the Federal Court stated that justification for such extradition under the aforesaid Treaty of Extradition had been established as a matter of fact and law and that, upon extradition, the defendant would be tried only for the offenses for which his extradition was requested and in no case for offenses of a political character. On December 3, 1959, the Federal Court issued a further order stating that all of the crimes for which extradition was requested were common crimes and not crimes of a political character and that in no case would the defendant be tried for crime of a political character or an act connected therewith.

Such order of December 3, 1959, is properly and legally authenticated. A copy of such order is attached hereto as Exhibit Q; a copy of the English translation thereof is attached hereto as Exhibit R, and the translator's affidavit is attached hereto as Exhibit S. [Exhibits omitted in this Appendix.]

15. On the basis of the preceding paragraphs of this second amended complaint, and of the documents referred to therein, and of other and additional documents and depositions, all properly and legally authenticated, plaintiff charges the defendant with common crimes as detailed below:

The defendant was one of three members of the Government Junta of the Republic of Venezuela from November 24, 1948, until December 2, 1952. Such Junta was the supreme power in the Republic during such period. From December 2, 1952, until July 1, 1953, defendant was Provisional President of the Republic. From July 1, 1953, until January 23, 1958, defendant was President of the Republic. From November 25, 1948, until July 1, 1953, defendant was Minister of Defense of the Republic. As a member of the Junta, he, jointly with the other two members thereof, and as Provisional President and President, he alone had responsibility for administering the public affairs of the Republic, including the direction of the secret police agency known as the Seguridad Nacional and the military police, the awarding of contracts for supplies and materials and for public works, the administration of public funds and the expropriation of land for public purposes. As Minister of Defense the defendant was directly responsible for the expenditures of the Ministry, including particularly the awarding of contracts for war material.

All of the conduct of the defendant described in the succeeding subparagraphs of this paragraph 15 occurred while he was actually in Venezuela.

A. (1) During the period from November 24, 1948, until January 23, 1958, the defendant in violation of law confederated, schemed, connived, conspired and agreed with persons connected with the Seguridad Nacional, including Luis Felipe Llovera Paez, Laureano Vallenilla Lanz, Pedro Estrada, Miguel Silvio Sanz Anez, Rafael Ochoa Maldonado, Daniel Colmenares (alias Sueles-puma), Francisco Ramón Matute, Isidoro Marrero Mendez, Braulio Barreto Pacheco, Juan Vicente Pacheco Retali (alias Pachequito), Gregorio Gonzalez Gomez (alias El Alcatraz), Jesus Manuel Anez Miliani, Carlos A. Parada and Asun-

cion Cabrite Rojas and divers others, including officers of the military police acting in conjunction with the Seguridad Nacional, to effect the unlawful murders of certain persons in Venezuela. In the course of and in pursuance of such scheme, Dr. Leonardo Ruiz Pineda, Dr. German Gonzalez, Dr. Antonio Pinto Salinas and Mr. Luis Hurtado Higuera were murdered by persons purporting to act as agents of the aforesaid Seguridad Nacional or the military police, acting in conjunction with the Seguridad Nacional.

(2) During such period, the defendant in violation of law ordered the unlawful murders of Dr. Leonardo Ruiz Pineda, of Dr. German Gonzalez, of Dr. Antonio Pinto Salinas, and of Mr. Luis Hurtado Higuera, by persons purporting to act as agents of the Seguridad Nacional or the military police acting in conjunction with Seguridad Nacional, whose conduct in fact was controlled and determined by the defendant.

The murder of Dr. Leonardo Ruiz Pineda occurred on the night of October 21, 1952, in Caracas, Venezuela, on Avenida Principal de San Agustin del Sur, by a gunshot or gunshots fired by one or more of a detachment of agents of the Seguridad Nacional, among whom were Daniel Colmenares (alias Suelespuma) and Francisco Ramon Matute.

The murder of Dr. German Gonzalez occurred on the night of October 22, 1952, in or near the headquarters of the Seguridad Nacional in Caracas, by gunshots fired by an unknown officer of the military police acting in conjunction with the Seguridad Nacional, while the aforesaid Gonzalez was a prisoner of the Seguridad Nacional.

The murder of Dr. Antonio Pinto Salinas occurred in the early morning of June 11, 1953, in the township of San Juan de los Morros, Moscio District, State of Guarico,

Venezuela, on the Los Llanos Highway at a point known as Cueva de Tigre by gunshots fired by one or both of Braulio Barreto Pacheco and Isidoro Marrero Mendez, agents of the Seguridad Nacional.

The murder of Mr. Luis Alberto Hurtado Higuera occurred on or about March 13, 1954, at or near a place known as El Junquito, on the outskirts of the city of Caracas, Venezuela. Mr. Hurtado was beaten and kicked to death by agents of the Seguridad Nacional, among whom were Juan Vicente Pacheco Retali (alias Pachequito), Gregorio Gonzalez Gomez (alias El Alcatraz), Jesus Manuel Anez Milianti, Carlos A. Parada and Asuncion Cabrite Rojas.

The defendant participated in such murders as a principal in violation of Article 407 of the Penal Code of the Republic of Venezuela, which provides:

> "Whoever has voluntarily inflicted death on any person shall be punished with imprisonment for twelve to eighteen years."

If not a principal in such murders, the defendant was an accessory thereto within the meaning of Article 84 of the Penal Code of the Republic of Venezuela, which provides:

> "The penalty corresponding to the applicable crime, reduced by one-half, shall be suffered by any person who has participated therein in any of the following ways:
>
> 1. Inciting or abetting the decision to commit the crime or giving a promise of aid and assistance after its commission.
> 2. Giving instructions or supplying means for its commission.
> 3. Facilitating the performance of the act or aiding and abetting its performance, either before or during its performance.
>
> The reduction of the penalty provided in this article shall be inapplicable, in any of the cases herein speci-

fied, to persons without whose participation the act would not have been committed."

B. During the period from November 24, 1948, to January 23, 1958, defendant by himself engaged in a series of acts, and likewise, during such period, defendant confederated, schemed, connived, conspired and agreed with other persons, including Napoleon Dupouy, Fortunato Herrera, Luis Felipe Llovera Paez, Laureano Vallenilla Lanz, Silvio Gutierrez, Pedro A. Gutierrez Alfaro, Oscar Mazzei, Carlos Pulido Barreto and divers others, to engage in a series of acts which had as an objective his and their illicit enrichment at the expense of the public.

During such period, from time to time and in violation of law, the defendant abstracted and misappropriated funds with the administration and custody of which he had been entrusted by virtue of his office, in the amount of more than 40,500,000 Venezuelan bolivares (equivalent to more than $12,000,000), and converted them to his personal use and benefit and the use and benefit of others. Specific means and devices whereby the defendant abstracted and misappropriated funds with the administration and custody of which he had been entrusted by virtue of his office included:

(1) the conversion to his own use and benefit and the use and benefit of others of funds in the public treasury;

(2) the diversion to himself through intermediaries and to others of funds in the public treasury;

(3) causing improvements to be made and work to be done on his private property and in connection with his private ventures at public expense, in some cases by public employees using tools and machinery the property of the public;

(4) the receipt of profits realized by intermediaries for himself and co-conspirators on transactions with the Government of the Republic of Venezuela;

(5) the receipt by him and by others on his behalf and otherwise and the conversion to his and their use and benefit of so-called commissions and other rewards and benefits in connection with the negotiation and award of contracts for the purchase with public funds of guns, cannon, tanks, boats, launches, warships, airplanes, communications equipment and other articles or property supplied or to be supplied to the Government of the Republic of Venezuela;

(6) the payment to himself and to others on his behalf and otherwise of funds purportedly for the purchase of property by the Government of the Republic of Venezuela pursuant to decrees of expropriation, and in connection with other transactions with the Government of the Republic of Venezuela from which he and others on his behalf and otherwise unlawfully benefited;

(7) the means and devices described in the following subparagraph C of this paragraph 15, the allegations in which are incorporated herein by reference as illustrative of the means and devices used by the defendant, whether or not they are otherwise encompassed by subparagraphs (1) through (6) above.

The acts described above were in violation of Articles 195, 196, 198, 199 and 205 of the Penal Code of the Republic of Venezuela, an accurate English translation of which is set out hereinafter.

C. During the period from November 24, 1948, to January 23, 1958, defendant by himself engaged in a series of acts, and likewise, during such period defendant confederated, schemed, connived, conspired and agreed with other

person, including Napoleon Dupouy, Fortunato Herrera, Luis Felipe Llovera Paez, Laureano Vallenilla Lanz, Silvio Gutierrez, Pedro A. Gutierrez Alfaro, Oscar Mazzei, Carlos Pulido Barreto and divers others, to engage in a series of acts which had as an objective his and their illicit enrichment at the expense of the public.

(1) (a) During such period, from time to time and in violation of Article 195 of the Penal Code of the Republic of Venezuela, the defendant abstracted at least $1,746,467.18 in funds with the administration and custody of which he had been entrusted by virtue of his office by the receipt, in the form of so-called commissions, of portions of the contract prices of guns, cannon, tanks, boats, launches, warships, airplanes, communications equipment and other articles or property purchased by the Government of the Republic of Venezuela. The foregoing charge is based upon the following instances of the receipt of so-called commissions each of which is charged as a separate, substantive violation of Article 195 of the Penal Code of the Republic of Venezuela:

(i) On or about July 16, 1951, the defendant received a commission of 125,000 Venezuelan bolivares ($37,313.43) on a contract or contracts of an agency of the Government of the Republic of Venezuela with Empresas Campenon Bernard de Venezuela, S. A., a Venezuelan corporation engaged in construction work.

(ii) On or about January 30, 1952, defendant received a commission of $58,951.50 on two contracts of the Government of the Republic of Venezuela, dated March 18, 1949, and signed by the defendant as Minister of Defense, with the Swedish armaments manu-

facturer, Aktiebolaget Bofors, for the purchase of field cannon, accessories, spare parts and ammunition, and naval cannon, naval guns and ammunition for both, in the amounts, respectively, of $889,500 and $1,468,560.

(iii) On or about September 12, 1951, October 11, 1951, and January 30, 1952, the defendant received a commission of $19,136.25 on a contract entered into by an agency of the Government of the Republic of Venezuela on June 30, 1950, in the amount of $1,701,000.

(iv) On or about September 12, 1951, October 11, 1951, and January 30, 1952, the defendant received a commission of $17,885 on a contract entered into by an agency of the Government of the Republic of Venezuela on December 15, 1950, in the amount of $511,000.

(v) On or about September 12, 1951, October 11, 1951, and January 30, 1952, the defendant received a commission of $148,960 on a contract of the Government of the Republic of Venezuela, dated July 24, 1951, and signed by the defendant as Minister of Defense, with the British firm, Vickers-Armstrong (shipbuilders), Ltd., for the construction of the destroyer "Aragua" for the Venezuelan Navy, in the amount of £ 2,637,000.

(vi) On or about October 29, 1951, the defendant received a commission of $60,000 on a contract of the Government of the Republic of Venezuela, through its Ministry of Communications, dated October 4, 1951, with the International Standard Electric Company

of New York, for the purchase of equipment for a ground-to-air communications system for 47 airports in Venezuela, at a cost of 9,111,648.86 Venezuelan bolivares, or $2,948,754.

(vii) The defendant received a commission of $785,000 on one or both of two contracts of the Government of the Republic of Venezuela, through its Ministry of Defense, the first dated March 29, 1953, and signed by the defendant as Minister of Defense, and the second dated January 27, 1954, with the Italian firm Ansaldo, S. A., for the construction for the Venezuelan Navy of six light destroyers at a cost of $5,225,000 each, or a total of $31,350,000. The commission was received at or about or after the dates of such contracts.

(viii) The defendant received a commission of $190,272 on a contract of Linea Aeropostal Venezolana, a corporation owned by the Republic of Venezuela, dated May 27, 1954 with the British firm Vickers-Armstrong (aircraft), Ltd., for the purchase of three Viscount aircraft and related spare parts and spare engines, at a cost of £ 1,411,871. The commission was received at or about or after the date of such contract.

(ix) The defendant at or about the dates he received the commissions described in subparagraphs (vii) and (viii) above received a commission of $258,774 on a contract for the purchase of tanks by the Government of the Republic of Venezuela.

(x) The defendant at or about the dates he received the commissions described in sub-

paragraphs (vii) and (viii) above received a commission of $170,175 on contract for the purchase of boats or launches by the Government of the Republic of Venezuela.

(b) During such period, from time to time and in violation of Article 195 of the Penal Code of the Republic of Venezuela, the defendant abstracted all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64) in funds with the administration and custody of which he had been entrusted by virtue of his office by the receipt of such sum or portion thereof purportedly paid by the Government of the Republic of Venezuela for the expropriation of land for public purposes. The foregoing charge is based upon the following instances of the receipt of sums purportedly paid for the expropriation of land for public purposes, each of which is charged as a separate, substantive violation of Article 195 of the Penal Code of the Republic of Venezuela:

(i) On or about July 30, 1956, the defendant received through the aforesaid co-conspirator Fortunato Herrera all or a portion of an illegal profit of 3,627,360 Venezuelan bolivares ($1,082,794.03) realized by Herrera with the assistance of the defendant on the sale of 40,304 square meters of land to the Government of the Republic of Venezuela. The land, of which the record owner was C. A. Industrial del Carton, a Venezuelan corporation, was appraised and purchased by the Government pursuant to an expropriation decree promulgated by the defendant on July 22, 1955, for the acquisition of land for a highway facility.

(ii) On or about June 7, 1956, the defendant re-received through the aforesaid Herrera all or a portion of an illegal profit of 3,320,210.50 Venezuelan bolivares ($991,107.61) realized by Herrera with the assistance of the defendant on the sale of the estate La Preferida in El Valle, Venezuela, to the Government of the Republic of Venezuela. The estate, of which the record owner was Mrs. Rafaela Agreda de Jimenez, was appraised and purchased by the Government for the construction of an Armed Forces Training Center, pursuant to a decree of expropriation promulgated by the defendant and others on August 15, 1952.

(c) During such period, from time to time and in violation of Article 195 of the Penal Code of the Republic of Venezuela, the defendant abstracted 162,359 Venezuelan bolivares ($48,465.52) in funds with the administration and custody of which he had been entrusted by virtue of his office by causing work to be done and improvements to be made on his private property, at public expense, and the receipt of such benefits. The foregoing charge is based upon the following instances of work performed and improvements made on the defendant's private estate, each of which is charged as a separate, substantive violation of Article 195 of the Penal Code of the Republic of Venezuela:

(i) In 1954 a well was dug at the defendant's private estate "El Penon," Baruta, Sucre District, State of Miranda, Venezuela, by and at the expense of the National Institute of Sanitary Works, an agency of the Government of the Republic of Venezuela. The

cost to the Government was 14,080.50 Venezuelan bolivares ($4,203.13).

(ii) Between July 1955 and January 1958 gardeners in the employ of the State of Miranda, whose budget was under the defendant's direction, performed work at the aforesaid estate "El Penon" at a cost to the public of 148,279 Venezuelan bolivares ($44,262.39) in wages alone.

(d) On divers dates from 1955 until January 23, 1958, in violation of Article 195 of the Penal Code of the Republic of Venezuela, the defendant abstracted more than 300,000 Venezuelan bolivares ($89,552.24) in funds with the administration and custody of which he had been entrusted by virtue of his office by the receipt by himself and the aforesaid co-conspirators Laureano Vallenilla Lanz and Silvio Gutierrez of profits realized by the Venezuelan corporation, Empresa Venezolana de Ingeneria y Construccion, S. A. (EVICSA), which was an intermediary created for the benefit of defendant and certain of his co-conspirators, including the aforesaid Vallenilla Lanz and Gutierrez, in 1954, they being the owners of shares of stock therein, and which during the period 1955 through 1957 performed contracts for the construction of a hotel and ancillary projects awarded by the Ministry of Fomento of the Government of the Republic of Venezuela, of which the head was the aforesaid Silvio Gutierrez, and which contracts were awarded with the knowledge of the defendant, and on which the aforesaid profits were realized.

(2) (a) During such period, from time to time and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his

office forced persons wishing to enter into contracts for the supplying of war materiel and other articles and property to the Government of the Republic of Venezuela to give him the sum of at least $1,746,467.18. Such abuse of his office occured in connection with the receipt by the defendant of so-called commissions on Government contracts described in subparagraphs (1) (a) (i-x) above, which are charged severally, each as a separate, substantive violation of Article 196 of the Penal Code of the Republic of Venezuela.

(b) During such period, from time to time and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced persons wishing to sell land to the Government, namely, the Venezuelan corporation C. A. Industrial del Carton and Mrs. Rafaela Agreda de Jimenez, to give him money in the amounts of all or a portion of 3,627,360 Venezuelan bolivares ($1,082,794.03) and 3,320,210.50 Venezuelan bolivares ($991,107.61), respectively. Such abuse of his office occurred in connection with the transactions described in subparagraphs (1) (b) (i-ii) above, which transactions are charged severally, each as a separate, substantive violation of Article 196 of the Penal Code of the Republic of Venezuela.

(c) During such period, from time to time and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced the aforesaid Fortunato Herrera to give him money in the amount of all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64), in connection with the transaction described in subparagraphs (1) (b) (i-ii) above, which transactions are charged severally, each as

a separate, substantive violation of Article 196 of the Penal Code of the Republic of Venezuela.

(d) During such period, at a date or dates to the plaintiff unknown and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced the officials of the National Institute of Sanitary Works, an agency of the Government of the Republic of Venezuela, to make a gift to him by digging a well in 1954 at his private estate "El Penon" in Baruta, Sucre District, State of Miranda, Venezuela, at a cost of 14,080.50 Venezuelan bolivares ($4,203.13).

(e) During such period, in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced officials of the State of Miranda to make a gift to him of the labor of gardeners and other workmen, who between July 1955 and January 1958, at a cost to said State of 148,279 Venezuelan bolivares ($44,262.39) performed services and made improvements at the aforesaid estate "El Penon".

(f) During such period, from time to time and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced certain persons, including the aforesaid Laureano Vallenilla Lanz and Silvio Gutierrez, to give him money in the amount of more than 300,000 Venezuelan bolivares ($89,552.24) and to make to him gifts of valuable securities, in connection with the organization of the aforesaid corporation Empresa Venezolana de Ingeneria y Construccion, S. A. (EVICSA), in 1954 and its realization of profits on contracts with the Government of the Republic of Venezuela in the period 1955 through 1957, as described more fully in subparagraph (1) (d) above.

(3) (a) During such period, from time to time and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced persons wishing to enter into contracts for the supplying of war materiel and other articles and property to the Government of the Republic of Venezuela to promise him the sum of at least $1,746,467.18, in connection with the receipt by the defendant of so-called commissions on Government contracts described in subparagraphs (1) (a) (i-x) above, which are charged severally, each as a separate, substantive violation of Article 196 of the Penal Code of the Republic of Venezuela.

(b) During such period, from time to time and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced persons wishing to sell land to the Government, namely the Venezuelan corporation C. A. Industrial del Carton and Mrs. Rafaela Agreda de Jimenez, to promise him money in the amount of all or a portion of 3,627,360 Venezuelan bolivares ($1,082,794.03) and 3,320,210.50 Venezuelan bolivares ($991,107.61), respectively, in connection with the transactions described in subparagraphs (1) (b) (i-ii) above, which are charged severally, each as a separate, substantive violation of Article 196 of the Penal Code of the Republic of Venezuela.

(c) During such period, from time to time and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced the aforesaid Fortunato Herrera to promise him money in the amount of all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64), in connection with the transactions

described in subparagraphs (1) (b) (i-ii) above, which are charged severally, each as a separate, substantive violation of Article 196 of the Penal Code of the Republic of Venezuela.

(d) During such period, from time to time and in violation of Article 196 of the Penal Code of the Republic of Venezuela, the defendant by abusing his office forced certain persons, including the aforesaid Laureano Vallenilla Lanz and Silvio Gutierrez, to promise to him money in the form of a share of the profits realized by the Venezuelan corporation Empresa Venezolana de Ingeneria y Construccion, S. A. (EVICSA), on contracts with the Government of the Republic of Venezuela and valuable securities representing a beneficial interest in such corporation, all as more fully described in subparagraph (1) (d) above.

(4) (a) During such period, from time to time and in violation of Article 198 of the Penal Code of the Republic of Venezuela, the defendant received remuneration not due him for the performance of his official duty in the amount of at least $1,746,467.18 in the form of so-called commissions on Government contracts as described in subparagraphs (1) (a) (i-x) above, which transactions are charged, severally, each as a separate, substantive violation of Article 198 of the Penal Code of the Republic of Venezuela.

(b) During such period, from time to time and in violation of Article 198 of the Penal Code of the Republic of Venezuela, the defendant received remuneration not due him for the performance of his official duty in the amount of all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64) in the form of profits on the expropriation of land by the Government, as described in subparagraphs

(1) (b) (i-ii) above, which transactions are charged severally, each as a separate, substantive violation of Article 198 of the Penal Code of the Republic of Venezuela.

(c) During such period, from time to time and in violation of Article 198 of the Penal Code of the Republic of Venezuela, the defendant received remuneration not due him for the performance of his official duty in the amount of more than 300,000 Venezuelan bolivares ($89,552.24), in the form of profits earned by the Venezuelan corporation, Empresa Venezolana de Ingeneria y Construccion, S. A. (EVICSA), as described in subparagraph (1) (d) above.

(5) (a) During such period, from time to time and in violation of Article 199 of the Penal Code of the Republic of Venezuela, the defendant received, or exacted promises of, money in the amount of at least $1,746,467.18, directly and through other persons, including the aforesaid Napoleon Dupouy, for delaying or omitting his official duty or doing acts which were contrary to his official duty. The said sum was received and promises were exacted in connection with the so-called commissions on Government contracts as described in subparagraphs (1) (a) (i-x) above, which are charged severally, each as a separate, substantive violation of Article 199 of the Penal Code of the Republic of Venezuela.

(b) During such period, from time to time and in violation of Article 199 of the Penal Code of the Republic of Venezuela, the defendant received, or exacted promises of, money in the amount of all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64), through the aforesaid Herrera, for delaying or omitting his official duty or doing acts

which were contrary to his official duty. The said money was received from and the said promises were exacted from the Venezuelan corporation C. A. Industrial del Carton, in connection with the transaction described in subparagraph (1) (b) (i) above, and by Mrs. Rafaela Agreda de Jimenez in connection with the transaction described in subparagraph (1) (b) (ii) above, which are charged severally, each as a separate, substantive violation of Article 199 of the Penal Code of the Republic of Venezuela.

(c) During such period, from time to time and in violation of Article 199 of the Penal Code of the Republic of Venezuela, the defendant received, or exacted promises of, money in the amount of all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64) from the aforesaid Herrera for delaying or omitting his official duty or doing acts which were contrary to his official duty, in connection with the transactions described in subparagraphs (1) (b) (i-ii) above, which are charged severally, each as a separate, substantive violation of Article 199 of the Penal Code of the Republic of Venezuela.

(d) During such period, from time to time and in violation of Article 199 of the Penal Code of the Republic of Venezuela, the defendant received, or exacted promises of, money and valuable securities for delaying or omitting his official duty or doing acts which were contrary to his official duty, directly and through other persons, including Laureano Vallenilla Lanz and Silvio Gutierrez, in connection with the organization and operation of the Venezuelan corporation Empersa Venezolana de Ingeneria y Construccion, S. A. (EVICSA), as described in subparagraph (1) (d) above.

(6) During such period, from time to time and in violation of Article 205 of the Penal Code of the Republic of Venezuela, the defendant obtained for himself, directly and through persons acting on his behalf, benefits in acts of public administration in which he performed functions, as follows:

(a) The defendant received so-called commissions in the amount of at least $1,746,467.18, in connection with the award of Government contracts, as described in subparagraphs (1)(a)(i-x) above, which are charged severally, each as a separate, substantive violation of Article 205 of the Penal Code of the Republic of Venezuela.

(b) The defendant received profits in the amount of all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64) on the sale, under expropriation decrees, of land to the Government for public works projects as described in subparagraphs (1)(b)(i-ii) above, which are charged severally each as a separate, substantive violation of Article 205 of the Penal Code of the Republic of Venezuela.

(c) The defendant caused work to be done and improvements to be made on his private property as described in subparagraphs (1)(c)(i-ii) above, which are charged severally, each as a separate, substantive violation of Article 205 of the Penal Code of the Republic of Venezuela.

(d) The defendant benefited in the amount of more than 300,000 Venezuelan bolivares ($89,552.24) from the contracts awarded to the Venezuelan corporation, Empresa Venezolana de Ingeneria y Construccion, S.A. (EVICSA), as described in subparagraph (1)(d) above.

D. During the period from November 24, 1948, to January 23, 1958, defendant by himself engaged in a series of acts, and likewise, during such period, defendant confederated, schemed, connived, conspired and agreed with other persons, including Napoleon Dupouy, Fortunato Herrera, Luis Felipe Llovera Paez, Laureano Vallenilla Lanz, Silvio Gutierrez, Pedro A. Gutierrez Alfaro, Oscar Mazzei, Carlos Pulido Barreto and divers others, to engage in a series of acts which had as an objective his and their illicit enrichment at the expense of the public.

During such period, from time to time and in violation of Articles 195, 196, 198, 199 and 205 of the Penal Code of the Republic of Venezuela:

(1) The defendant embezzled, abstracted and misappropriated funds from the public treasury of the Republic of Venezuela—

(a) in the amount of more than 40,500,000 Venezuelan bolivares ($12,000,000) by the means and devices described in subparagraph B above.

(b) in the amount of at least $1,746,467.18 by the means described in subparagraph C. (1)(a)(i-x) above.

(c) in the amount of all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64) by the means described in subparagraphs C. (1)(b)(i-ii) above.

(d) in the amount of 162,359 Venezuelan bolivares ($48,465.52) by the means described in subparagraphs C. (1)(c)(i-ii) above.

(e) in the amount of more than 300,000 Venezuelan bolivares ($89,552.24) by the means described in subparagraph C. (1)(d) above.

(2) The defendant corruptly discharged the functions of his office and thereby obtained certain moneys and other benefits which would not have passed to

him except by virtue of his office and converted them to his own use, as follows—

(a) The defendant obtained more than 40,500,000 Venezuelan bolivares ($12,000,000) by the means and devices described in subparagraph B above.

(b) The defendant caused to be paid to him or to other persons on his behalf, so-called commissions in the amount of at least $1,746,467.18, in connection with contracts of the Government of the Republic of Venezuela as described in subparagraphs C. (1)(a)(i-x) above.

(c) The defendant caused to be paid to himself illicit profits on the sale of land to the Government of the Republic of Venezuela, in the amount of all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64) as described in subparagraphs C. (1)(b)(i-ii) above.

(d) The defendant caused work to be done and improvements to be made, paid for from funds with the administration and custody of which he was charged by virtue of his office, on his private estate, as described in subparagraphs C. (1)(c)(i-ii) above.

(e) The defendant obtained for himself valuable securities and benefits in the amount of more than 300,000 Venezuelan bolivares ($89,552.24) on contracts with the Government of the Republic of Venezuela, as more fully described in subparagraph C. (1)(d) above.

(3) The defendant received money, valuable securities and other property, knowing the same to have been unlawfully obtained, as follows:

(a) The defendant received the sum of $1,746,467.18 in the form of so-called commissions on contracts

of the Government of the Republic of Venezuela, as described in subparagraphs C. (1)(a)(i-x) above.

(b) The defendant received all or a portion of 6,947,570.50 Venezuelan bolivares ($2,073,901.64) in the form of profits on the sale of land to the Government of the Republic of Venezuela as described in subparagraphs C. (1)(b)(i-ii) above.

(c) The defendant received more than 300,000 Venezuelan bolivares ($89,552.24) in the form of illegal profits realized by the Venezuelan corporation, Empresa Venezolana de Ingeneria y Construccion, S.A. (EVICSA), in connection with the performance of contracts with the Government of the Republic of Venezuela, as described in subparagraph C. (1)(d) above.

(4) The defendant, occupying as a public official the position of fiduciary with respect to the citizenry of the Republic of Venezuela, fraudulently misappropriated money and other property of those to whom his fiduciary duties were owed in the manners described in subparagraphs B and C. (1)(a-d) above.

(5) The defendant, occupying as a public official the position of a fiduciary with respect to the citizenry of the Republic of Venezuela, in breach of his trust misappropriated funds and property of those to whom his fiduciary duties were owed in the manners described in subparagraphs B and C. (1)(a-d) above.

The articles of the Penal Code of the Republic of Venezuela referred to in subparagraphs B, C and D of this paragraph 15, in English translation, read as follows:

Article 195:

"Every public official who abstracts funds or other personal property the collection, custody or administration of which has been entrusted to him by virtue of his office, shall be punished by hard labor for three to ten years.

"If the loss is not heavy, or if complete reparation is made before the guilty party is brought to trial, he shall suffer imprisonment for three to twenty-one months."

Article 196:

"Every official who by abusing his office forces a person to give or to promise to him or to any third party any sum of money or other illicit profit or gift shall be punished by imprisonment for eighteen months to five years.

"If the amount or thing illicitly given or promised is of little value, the period of imprisonment shall be for three to twenty-one months."

Article 198:

"Every official who, for the performance of any official duty, received for his own or another's account, a remuneration, whether in the form of money or any other thing which is not due him, or accepts any offer of such remuneration, shall be punished by imprisonment for one to two months."

Article 199:

"Every public official who receives, or exacts a promise of, money or other benefit, either directly or through another person, for delaying or omitting any official duty, or for doing an act which is contrary to that duty, shall be punished by hard labor for a period of three to five years. The term of hard labor shall be for a period of four to eight years if the offense has resulted in:

1. The grant of public office, emoluments, pensions or honors, or the award of contracts in which the agency employing the official has an interest.

2. Tending to cause any loss or injury to any of the parties to a civil action or to a party found guilty in a criminal proceeding.

"If the act has resulted in a conviction carrying a restriction of personal liberty in excess of six months, the term of hard labor shall be three to ten years."

Article 205:

"Every public official who directly, or through an intermediary or by deceit, obtains for himself any personal benefit in any act of public administration in which he performs a function shall be punished with imprisonment for sixth months to five years."

16. The offenses thus charged against the defendant are crimes within Article II of the aforesaid Treaty of Extradition, including, but not limited to, paragraphs 1, 2, 14, 18, 20 and 21 of said Article. The defendant is not exempt from prosecution or punishment therefor, from lapse of time or other lawful cause, under the laws of the Republic of Venezuela.

WHEREFORE, the plaintiff prays that this Court issue its warrant for the arrest of the defendant or that the arrest of the defendant heretofore effected on the warrant issued pursuant to the complaint and continued under the warrant issued pursuant to the amended complaint herein shall be further continued; and that the defendant be brought in due course before this Court, or a commissioner hereof, for a hearing and consideration of evidence of the defendant's criminality as provided in 18 U.S. Code 3184; and the plaintiff further prays that, after such hearing, a certification as provided in 18 U.S. Code 3184 be issued to the Secretary of State of the United States of America in order that the surrender of the defendant may be effected upon requisition of the proper authorities of the Republic of Venezuela; and the plaintiff further prays for such other

or different relief as may be just and proper in the premises.

MANUEL ARISTEGUIETA
Consul General of the
Republic of Venezuela

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Miami, Florida

HOWARD C. WESTWOOD
COVINGTON & BURLING
Union Trust Building
Washington 5, D. C.
Attorneys for Plaintiff

CITY OF MIAMI
COUNTY OF DADE
SOUTHERN DISTRICT OF FLORIDA } ss:
MIAMI DIVISION

Before me, the undersigned United States District Judge, personally appeared this day of March 1960, Manuel Aristeguieta, Consul General of the Republic of Venezuela, located at Miami, Florida, who, upon being duly sworn, upon oath states that upon information and belief, the allegations contained in the foregoing second amended complaint are true; and that such information and belief on his part are based upon (a) his personal examination of the extradition documents in the case of Marcos Perez Jimenez, (b) his personal examination of orders of the Federal Court of Venezuela dated November 10, 1959, and December 3, 1959, referred to hereinabove, (c) his personal examination of documents and depositions in the matter of the action of the Republic of Venezuela against Marcos Perez Jimenez transmitted to his attorneys by the Attorney General of Venezuela, (d) consultation with his attorneys and (e) instructions from the Ambassador of Venezuela in Washington, D. C.

United States District Judge

APPENDIX 5

Notices of Depositions

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No.9425-M-Civil

MANUEL ARISTEGUIETA, Consul General for the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

NOTICE OF DEPOSITION

Please take notice that plaintiff demands that The First National City Bank of New York appear at 10:30 A. M. on November 16, 1959, at Room 601, United States Court House for the United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, New York, New York, at which time and place plaintiff will take the deposition upon oral examination of George F. Nolte, Assistant Vice-President of The First National City Bank of New York, and of any other officer or employee having knowledge of the facts, pursuant to the Federal Rules of Civil Procedure, before an officer authorized by law to administer oaths.

The examination will continue from day to day until completed.

/s/ HOWARD C. WESTWOOD
Howard C. Westwood

/s/ DAVID C. ACHESON
David C. Acheson

Attorneys for Plaintiff
701 Union Trust Building
Washington 5, D. C.

Of Counsel:

JOHN LOGAN O'DONNELL, *Esq.*
Olwine, Connelly, Chase,
O'Donnell & Weyher
52 Vanderbilt Avenue
New York 17, New York

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No.9425-M-Civil

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

NOTICE OF DEPOSITION

Please take notice that plaintiff demands that the French American Banking Corporation appear at 10:30 a.m. on November 17, 1959, at Room 601, United States Court House for the United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, New York, New York, at which time and place plaintiff will take the deposition upon oral examination of Walter Anderson, Secretary the French American Banking Corporation, and of any other officer or employee having knowledge of the facts, pursuant to the Federal Rules of Civil Procedure, before an officer authorized by law to administer oaths.

The examination will continue from day to day until completed.

/s/ WILLIAM G. WARD
William G. Ward
1240 Dupont Building
Miami, Florida

/s/ DAVID C. ACHESON
David C. Acheson
701 Union Trust Building
Washington 5, D. C.

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To:

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Walters, Moore & Costanzo
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Miami 32, Florida
Attorney for Defendant